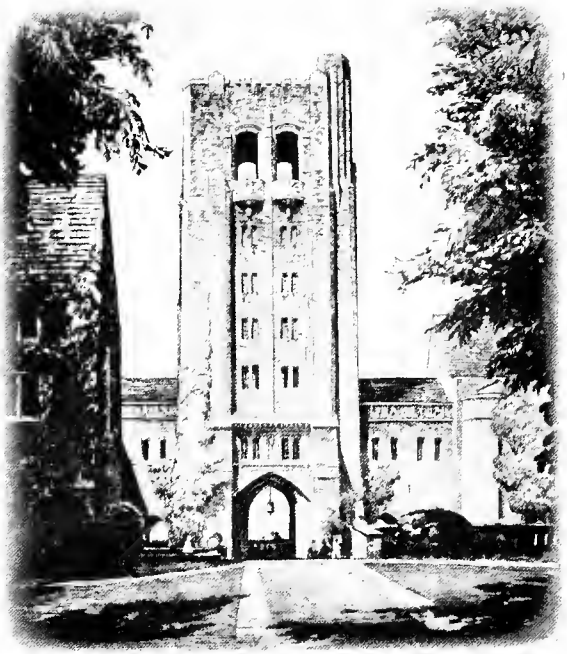

LEGAL ETHICS.

LECTURES

DELIVERED BEFORE THE STUDENTS

OF

LAW DEPARTMENT OF UNION UNIVERSITY

BY

GEN. THOMAS H. HUBBARD

AND

SIMEON E. BALDWIN, LL. D.

1903

INSTITUTION

...OF...

CHAIR OF LEGAL ETHICS.

ALBANY LAW SCHOOL.

On the evening of November 12, 1903, Union University, represented by its Faculty, a large body of the Alumni, and the students of its five departments, honored Gen. Thomas H. Hubbard, the founder of the Chair of Legal Ethics in the Albany Law School, by attendance at the formal institution of that chair and opening lecture by its founder.

For the first time in the history of Union University the Faculty and students of the departments were brought together at Odd Fellows Hall in Albany where the exercises were held. The law students occupied the seats directly facing the stage, while on their right were the members of the academic department, and on their left the medical students and students in the School of Pharmacy. The College Glee Club sang college songs which were joined in by students of all the departments.

Dr. A. V. V. Raymond, Chancellor of the University, presided. On the platform were the Deans of the different departments, J. Newton Fiero of the Law School, Dr. Vander Veer of the Medical College, Prof. Willis G. Tucker of the College of Pharmacy, and Dean Ripton of the Academic Department, together with the members of the Faculty of the University. Chief Judge Parker and Judge Vann, graduates of the school, with other judges of the Court of Appeals, several justices of the Supreme Court, and members of the bar were in attendance.

Bishop Burke opened the services with prayer after which Chancellor Raymond spoke as follows:

Never before in the history of this University have all the departments been brought together in visible union, as they are to-night. This alone makes it an occasion of special interest and a happy omen, let us believe, of the closer relations in the future which we all desire, and which are so necessary for the development of a true university feeling and life. I need not dwell upon the importance of developing this university spirit. This is an age of combinations, commercial, political and religious organizations having much in common unite their energies in some form of practical co-operation to their mutual advantage, and, within certain necessary limitations, to the general good. Educational interests proverbially conservative have been among the last to yield to this tendency of the times. This accounts in part for the fact that while these various schools have existed for many years under a form of university control, no serious attempt has been made until recently to give vitality to the organization. In this country there are two distinct phases of the university idea. One puts emphasis upon graduate courses of study, demanding original research and investigation, leading to the degree of Doctor of Philosophy. The other is expressed in an association of schools, more or less independent in their work, and leading to various degrees. Our right to the University title is found altogether in the association of different institutions. We attempt no distinctively graduate work, but include in our University corporation the college at Schenectady and the Law School, Medical School, School of Pharmacy, and Dudley Observatory in this city. Each of these institutions has its own board of trustees, and the board of governors of the University is composed of representatives of these several boards. By the act of incorporation, the President of Union College is Chancellor of the University, and his name must be signed to all the diplomas. Thus far the functions of the board of governors have been largely nominal, and as a result the University has been more a name than a reality. We have, however, a complete theoretical University organization, and our aim now is to give it practical efficiency and value. Many influences have contributed to retard

the realization of the original purpose of the founders of the University, influences which happily are not as effective as formerly. I have already mentioned the conservative spirit of educational institutions. This, however, is rapidly yielding to the spirit of the times, and we now see that each of the institutions represented here to-night will be stronger by co-operating with the others, by merging itself into a larger whole. Another opposing influence has been the difference in locality. If all the departments were in one city, there can be little question that the University sentiment would have grown much more rapidly, but with seventeen miles intervening between the college and the professional schools, the difficulty of developing a sense of oneness, of solidarity, has been greatly increased. This antagonistic influence is, however, losing much of its power by virtue of increased means of communication. Schenectady and Albany are each year drawing nearer to each other, and it will not be long before we cease to think of the intervening miles as a serious obstacle to practical co-operation. The little difficulty experienced in coming together to-night is a perfect illustration of the changed conditions. At 7 o'clock these students on my left were all on College Hill in Schenectady; at 8 o'clock they marched into this hall. Electricity has made Albany a part of Schenectady, or Schenectady a part of Albany, as you please. Whichever way you put it, it has made a real University, with departments in both cities possible, and by so doing has practically removed one cause of ancient rivalry, for the location of Union College has long been a subject of dispute. It may be interesting and not inappropriate on this occasion to recite a chapter from the early history of the college. So far as I have been able to discover, Union was the first college founded in response to a popular demand. Each of the older colleges was established either by the gift of some individual or by the deliberate act of some denominational organization; but as early as 1779, during the War of the Revolution, 850 citizens of Albany, Tryon and Charlotte counties, comprising at that time all of the northern section of the State, petitioned the Legislature sitting at Kingston for a college charter.

This petition was referred to a committee which reported favorably, recommending that the petitioners be allowed to bring in a bill at the next session. This, however, was not done, for the reason doubtless that the emergencies of war diverted attention from the project. Three years later, however, the petition was renewed, signed by 1,200 citizens of the same counties. No decisive action was taken, and it was not until 1795, after repeated attempts, that a charter was granted. When, in the fall of 1794, it seemed probable that the enterprise would succeed, various localities came forward with claims for the site of the new institution, among them Kingston, Hudson, Poughkeepsie, Lansingburg, Waterford, and even Stillwater, but the two most prominent claimants were Schenectady and Albany. Schenectady had been the first in the field, and as early as 1785 had established an academy, with the design of obtaining for it the college charter. The city offered as a foundation for the college 5,000 acres of land. Individuals added 700 acres and £1,000 in money. Albany then came forward with her offer. The Common Council voted to convey a part of the public square for the site of a college, and citizens subscribed $50,000. Thus the rivalry began, but it was not bitter enough to imperil the general cause. It is an interesting fact that the working committee, the committee that finally secured the charter, was accustomed to meet in Albany in the house of James McGourk, and was composed largely of Albanians, with Stephen Van Rensselaer as chairman. Such Albany names as Lansing, Gansevoort and Schuyler were prominent in the list of members, and it is certainly suggestive of broad-minded citizenship that the college was located in Schenectady largely through the influence of Gen. Philip Schuyler.

This generous spirit has at last been rewarded, for of the five departments of the University into which the college has grown, four are located in Albany, and for our first real University celebration the students and faculty of the college in Schenectady have been transported to this city. As the University sentiment grows, Albany will at least share the gain with Schenectady, and the city which makes the most generous provision for the work

of the University will doubtless be the center of this larger life. Be that as it may, we wish the faculty and students of each institution to feel that they are part of the larger whole, and that they are all concerned in the progress and prosperity of every other department. In the development of this mutual interest and hearty co-operation we shall realize the purpose deliberately agreed upon, and justify our name, "Union University."

Dean Fiero's Remarks.

At the conclusion of the Chancellor's address Dean Fiero spoke as follows:

I desire to express to you, Chancellor Raymond, and through you, to the Governors of the University, the Trustees, Faculties, and students of the several Departments, the congratulations of the Law Department upon this gathering of the governing bodies and students of Union University — and upon its significance for the future, in that we shall hereafter be more closely united, not alone as Departments having a common aim, but common interests.

It is most fitting that this gathering should be had upon the occasion of the introductory lecture on the subject of Legal Ethics, since the matter of ethics in the law is closely related to good morals, not alone in the profession but in all the walks of life. The remark of Judge Sharswood, as to the young lawyer, is equally applicable to any young man starting out upon his life work. He said: "There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction."

Hence both the propriety and the usefulness of attendance by the whole student body at the opening of this course, not only by reason of the instruction to be derived, but in recognition of the fact that whatever is in the interest of good principles and sound morals, is in the interest of the students of Union University.

The Chair of Legal Ethics was founded at a meeting of the Alumni Association, followed by the action of the Board of Trustees, at Commencement, in 1902, by one of our most successful and distinguished graduates, a member of the Class of 1860, a graduate of Bowdoin, and a veteran of the Civil War, who has not only endowed the Chair, but has evinced his interest in the subject-matter, by consenting to be present with us to deliver the opening lecture of the course on this occasion.

We have reason for congratulating ourselves upon the institution of this Chair, more especially by reason of the fact that we have, with a two year course — while most other Law Schools devote three years to the study of the law — had time and opportunity to devote attention mainly to the practical training of the student absolutely necessary to fit him for carrying on his profession. This Chair, which we hope will be followed by the founding of like professorships, will give us facilities for the higher education of the student along the lines of the other and older Universities. That education, which, to distinguish it from the practical, we have sometimes denominated theoretical, but which is, however, as useful and necessary to the student as the study of procedure or of the substantive law. We shall, in fact, be better equipped as to this branch of instruction than most of the Law Schools connected with the great Universities of the country — this subject forming no part of the curriculum in the leading Law Schools in the East, aside from the Chair in our sister Universities at Ithaca and Syracuse.

The plan adopted by the Board of Trustees, as to the lectures upon Legal Ethics, has been to obtain the views of eminent judges and lawyers in a single lecture, rather than the selection of a stated lecturer on the topic, thus placing before the students the views of the leading jurists of the country.

As has been already announced, Justice Brewer of the Class of 1858, and Judge Vann, of 1867, will deliver lectures during the scholastic year, in addition to this introductory lecture by Gen. Hubbard; thus opening the course by lectures from three of our most distinguished graduates. A lecture will also be given at

an early date by Judge Simeon E. Baldwin, of the Supreme Court of Connecticut.

We have in reserve for the course next year two of our graduates, Presiding Justice William W. Goodrich, of the Second Department, of the Class of 1853, and Chief Judge Parker, of 1872, together with Judge William E. Werner of the Court of Appeals.

On making to you the formal announcement of the founding of this professorship, I indulge the hope, sir, coupled with a reasonable expectation, that the founding of this Chair by one of the graduates of the Law Department will serve as an incentive to like action on the part of graduates in other departments, which shall tend to strengthen the hands, and increase the usefulness of Union University.

Chancellor Raymond then introduced Gen. Thomas H. Hubbard, the founder of the course and lecturer of the evening. Gen. Hubbard prefaced his lecture with these remarks:

" It is with some hesitancy that I address the five departments of this great University, still I have in mind that lawyers sometime frequently listen with more or less appreciation to legal lecturers, and, of course, I know that doctors listen with patience to the addresses made at clinics. Whatever you gentlemen may think of the address, which I will endeavor to deliver this evening, you can certainly encourage yourself with the prospects of brilliant addresses in the future. Dean Fiero has given you the names of eminent gentlemen, who are to address you during this year and next. The title of this lecture, if I might select it, would be, 'A need to amend and improve uniform oaths of office administered to attorneys on their admission to the bar.' In the records of human achievements the work of lawyers deserves significant recognition and commendation. They have maintained the right of the weak against the encroachments of the strong, they have assisted in the molding of the laws and have administered to the

courts in the enforcement of those laws, they have attained careers of professional achievement, careers of statesmanship. The purpose of this address or discussion is to present one phase of the subject, to point out defects in the system rather than to display its excellence."

LEGAL ETHICS.

A Plea for an Improved and Uniform Oath for Attorneys, upon their Admission to Practice.

In the record of human achievement the work of lawyers deserves grateful and signal commemoration.

They have maintained the rights of the weak against the encroachments of the strong. They have molded the laws that protect person and property and prevent the relapse from social order to anarchy. They have ministered to the courts in the enforcement of those laws. They have advanced from the routine of professional employment to broader careers of statesmanship and have guided the affairs of nations.

If the same records were written full and true, they would tell of many who have failed to meet the high requirements of their avocation. They would tell of craft and cunning, of injustice toward adversaries, of pitiless assault upon character, of the advocacy of the wrong, of the disregard of conscientious convictions.

It is the province of legal ethics to instruct lawyers in those rules that lead them, by the true course, to the loftiest heights and that withhold them from the false course, that descends into the depths.

These rules cover the relation of lawyers to their clients, to the court, and to the public. They expound the principles that should guide the conduct of all lawyers. They deal with the

details of deportment that vary with the temperament and training of individuals.

The subject is broad. Its adequate treatment requires many addresses and forms an important part of the education of every student of the law.

The purpose of this discourse is to present one phase of the subject; to point out defects in the system, rather than to display its excellence; to advert to some rules that seem to have brought discredit to the profession and to suggest some thoughts that may aid in maintaining the higher standards.

In all times since lawyers have been known, they have been the object of censure and of sarcasm in the speech and the literature of contemporaries. Wits have ridiculed them. Serious writers have decried them.

Some part of these attacks may be disregarded as groundless abuse. Some part is a natural incident to the lawyer's occupation. He is a combatant. The contests in which he engages are a substitute for the wager of battle between parties who once fought out their causes in the field with certain disturbance of temper.

But the preponderance of censure over praise seems to show that the censure has foundation in truth. And the utterances of critics not unfavorable compel attention to the strictures.

Mr. Homer Greene, himself a lawyer, and a graduate of the Albany Law School, expressed the opinion of many lawyers in an article published more than twelve years ago in the North American Review entitled, "Can Lawyers Be Honest?" Mr. Greene considers the question with judicial impartiality. He gives lawyers credit for absolute faithfulness toward their clients. He says that the lawyer enjoys a respect and faith on the part of his clients for which the merchant, the physician, even the preacher, may well envy him. And while he asserts that there is a popular opinion in America that lawyers, as a class, are dishonest, he also says that the lawyer is believed to be dishonest only when his dishonesty will advance the cause of his client and retard or defeat that of his opponent in the law. Mr. Greene illustrates his subject by instances where the lawyer is required

by his client to set up the defense of infancy, or the Statute of Limitations, to defeat a meritorious claim; by instances where he fights to suppress evidence that is prejudicial to his client, regardless of its character; by instances where, in the interest of his client, he withholds facts, known to himself, which, if disclosed, would put the case of his opponent in a better light. He speaks of concealment, evasion, exaggeration, and strained logic, as usual in the conduct of a cause, if they seem to the lawyer to serve the interests of his client.

The same thought is expressed by Lord Macaulay in an impetuous sentence.

"We will not," he says, "at present inquire whether the doctrine which is held on this subject by English lawyers be or be not agreeable to reason and morality; whether it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without these appendages, he would think it wicked and infamous to do for an empire; whether it be right that, not merely believing, but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false."

There can be no doubt that a large part of the public believes the censure which is expressed in such utterances deserved. It would benefit the public and the profession if the distrust that attends this belief were removed.

What are its causes, and where is the remedy to be found?

The popular answer to the first question would be that lawyers are distrusted because they accept the cases of bad men; because they advocate bad cases, or the wrong side of cases; because they urge, with equal fervor, that side of the case which they are hired and paid to urge and can be as earnest and as eloquent on one side as on the other.

Such an answer, at first glance, seems to prove a lack of sincerity on the part of the lawyer. To the superficial observer it seems incongruous that a virtuous lawyer should support the

cause of a vicious client; that an honest lawyer should try to make a dishonest case prevail; that a lawyer who has principle and convictions of his own should urge, for pay, either side of any question. Yet the answer does not present the real difficulty, nor does it suggest a remedy.

Bad and vicious men have rights of person and of property, no less than exemplary men. If their vice leads them to transgress the law, they are subject to legal punishment for specific offenses. But there is no edict of confiscation applicable to bad men. Among the vagaries of legislation no law has yet been proposed that forbids bad men to go into court, or to employ lawyers to appear in court for them. As no man is wholly good, it follows that all men are more or less bad, and the exclusion of bad men from the privilege of the courts would either exclude all citizens or would call for an impracticable classification based upon degrees of badness or of goodness.

There is no reason why a lawyer should not accept a retainer from the worst or most disreputable of men, unless the retainer puts the lawyer under control of the client, or compels him to personate the client, or to execute the orders that the vice of the client invents. If the retainer has this effect, then it makes the lawyer, no matter how virtuous in person, as bad as the client for the purposes of the client's suit.

To the criticism that lawyers advocate bad cases, or the wrong side of cases, there is a similar reply. There is, in a correct sense, no *bad* side of a case that has *two* sides. A case, properly defined, is a dispute, or controversy, where each party honestly believes that he has some right, or fraction of right, that the opposing party refuses to regard. Where such a controversy has passed the limits of negotiation, or adjustment, it may properly be submitted for the decision of the court. The court may decide that neither party shall have all he has claimed. It may decide that one of the parties shall have nothing that he has claimed. Yet it does not follow that the defeated party had a bad case, or that he was on the wrong side. The honest, though mistaken, assertion of a right, or any measure of right, denied by the

opponent, is the proper basis of a case. It casts no reflection upon the morals of a lawyer, though it may upon his ability, that he has espoused and urged a case, or the side of a case, that turns out to be bad in the sense that the court at last decides against it.

If it happens, as no doubt it does, that lawyer and client both see that the dispute, or controversy, involves no measure of legal right or of justice, then no basis for a case in court exists. It is merely a quarrel, that should not be obtruded upon the court, or made an item of expense to the public that maintains the courts.

Nor can the fact that the lawyer argues that side of the case for which he is retained and paid account for the distrust with which he is regarded. The only limitation in this respect is that he shall not argue *both* sides of the same case. He may regret that he has not been retained on the side that has the greater measure of right. But it is reason for commendation and not for censure, that he can argue honestly and earnestly in support of the measure of right, however small, that he believes to be his client's.

These considerations make it easier to state the real causes for such distrust, or discredit, as attaches to the profession and practice of the law.

Prominent among these causes are two:

First of these is the fact, recognized by the ethics of the profession, that clients, and not lawyers, decide what cases shall be brought into court and control the substantial methods of their conduct in court.

The second is that lawyers are permitted to personate their clients; to say what they think their clients would say and do what they think their clients would do, in order to win their cases.

In considering the first of these causes it must be admitted that if the lawyer refuses to bring a suit at the direction of the client, he cannot be compelled by legal process to bring it. The process to which the client resorts is to take his business to

another lawyer. And the ethics of the profession permit the second lawyer, as they would have permitted the first, to commence the suit against his own belief, or even knowledge, that it has no foundation in law or justice, if the client insists that it shall be brought.

The adjudications give the client substantial control of the conduct of the litigation throughout its course. They clearly settle that the client has the right to direct and control his lawyer in respect to the clients' rights of property, or substantial rights. They state that the lawyer shall have control in matters of form and procedure and shall remain untrammeled in the due and orderly conduct of the suit.

But where is the line of division between matters of substantial right and matters of form and procedure, or due and orderly conduct? Does the attorney's right to control in the "due and orderly conduct of the suit" empower him to decide whether or not to plead the Statute of Limitations, or of usury, or of infancy, in any given case? If he knows that a defense under these statutes will defeat a plaintiff's just claim, protect a rascal, and cheat an honest creditor, has he the right as attorney to decide whether such a defense shall or shall not be put in? If the client directs him to put a witness on the stand, may the lawyer refuse because he thinks, or knows, it will work injustice to do so? If the client directs him to put before the court documents or decisions that he knows will mislead, may he decline to follow the directions? Must he follow them where he thinks or knows that what the witness will say and what the documents will tend to prove relate to substantial or property rights of the client, and may he refuse to follow the directions *only* where he thinks, or knows, that they relate to and will affect matters of form or procedure? Is the obedience or disobedience of the lawyer to be determined by his own refinements of reasoning upon these probable effects? If the client instructs the lawyer to make certain statements or arguments in his opening or closing address, must the lawyer obey, provided the statements are pertinent and not wholly unsupported by evidence and relate to substantial rights, or may he refuse, if he thinks the statements ought not to be made?

The client's power to control in all doubtful instances is fortified by the circumstance that he is employer and the lawyer employee and by the doctrine, pushed sometimes to extreme application, that the lawyer is trustee of his client's interests, including his hopes, prejudices, and passions and that, to quote the language of Lord Brougham, the lawyer "in the discharge of his duty, knows but one person in the world, his client and no other;" that "to save that client * * * he must not regard the alarm, the suffering, the torment, the destruction he may bring upon others," but "must go on, reckless of consequences, even if his fate should unhappily be to involve his country in confusion for his client."

It is true, no doubt, that lawyers in many instances dissuade their clients from bringing suits, or interposing defenses that ought not to be brought or interposed. It is true that efforts so to dissuade form no small part of the lawyer's labor in consultation with his client. But where the effort to dissuade is unavailing, it is the decision of the client and not of the lawyer that finally prevails.

The disputant in petty quarrels, whose threat at the end of a wrangle is "I will have the law on you," finds his lawyer to do his bidding.

The manager of great interests who plans suits for strategic effect, with no expectation of ultimate success, finds his.

And so it turns out that the lawyer is compelled to conduct litigations that his own conscience does not approve and to shelter himself from its reproaches by adopting the hypothetical conscience of the client.

It is not the purpose here to set lawyer and client in contrast, or to eulogize the one and disparage the other. The lawyer should be at least up to the average level of his clients, in respect of cultivation, intellect, and morals. It is believed that such lawyers as are contemplated in this address do stand upon at least as high a plane.

But if, in these respects, lawyers and clients are peers, it yet remains true that the controversy, with all its attendant exaspera-

tions, is the client's controversy. Its asperities, its irritations, its impulses, its interests, are not the lawyer's, save as he receives them from the client. If he receives them in bulk, as a common carrier receives all goods that are offered; if, as the servant of the client, he carries them all through the portals and into the temple of justice; if he surrenders his own convictions to the wishes of his client, then he gives to his cases the elements that retard justice and bring the practice of the law into disrepute. He obtrudes upon the court, the passion, the prejudice, the unreason of the client. These should be left outside the court-house door. The controversy that crosses the threshold should be a controversy sifted by the intelligence and shaped by the conscience of the lawyer. It should be the essence of honest difference in the assertion of rights, not the turmoil of personal dispute.

There was mentioned as another cause of distrust toward lawyers the rule, or usage, that permits the lawyer to personate his client, and, in time of stress, to substitute for his own conscience a hypothetical conscience assumed to belong to his client.

It may not be correct to say that the ethics of the profession prescribe such conduct, but it is no exaggeration to say that they permit it.

A leading authority of our own time presents the prevailing professional view of the subject in the following words: "The party has a right to have his case decided upon the law and the evidence and to have every view presented to the minds of the judges which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for error of the court, if they fall into error, in deciding it in his favor. The court, or jury, ought certainly to hear and weigh both sides, and the office of the counsel is to assist them by doing that which the client in person, from want of learning, experience, and address, is unable to do in a proper manner."

Another high authority, whose ethical standards and conduct none of the profession excelled, expresses the accepted doctrine

in these words: "Within a certain and definite limit it is true that the lawyer must, in the interest of his client, whenever any real case exists, sometimes forego his own opinion and surrender his own judgment and plead against his own conviction and even succeed against his own expectation."

The same authority quotes Bishop Warburton, as follows: "Though some of those who call themselves casuists have held it unlawful for an advocate to defend what he thinks an ill cause, yet I apprehend it to be the natural right of every member of society, whether accusing or accused, to speak freely and fully for himself. And if, either by legal or natural incapacity, this cannot be done in person, to have a proxy provided or allowed by the State to do for him what he cannot or may not do for himself, I apprehend that all States have done it and that every advocate is such a proxy."

If the writers of the passages quoted were speaking for a client, they would restrain their speech by the curb of their own enlightened consciences. Others, whose consciences are less enlightened, need the restraint and help of a less elastic rule.

Agreeably to the ethics of the profession as now understood, the lawyer may, and under penalty of losing his clients, must, take into court such cases as the client directs. He may, and, at the same risk, must, conduct them in court with all the temper, prejudice, and personal rancor of the client. He must conduct them in substance according to the wishes of the client. He may personate the client; speak as he thinks the client would speak, or would like to have him speak, and, discarding his own convictions and the restraints of his own conscience, shape his conduct by what he assumes to be, yet which may not be, the conscience of his client. And, under established decisions, he may say with immunity, of his adversary and of adverse witnesses, false things and even malicious things, if only they are pertinent to the cause in issue.

What wonder that, under these conditions, causeless and conscienceless litigations go on? What wonder that the profession has earned a reputation for disingenuousness? The lawyer, bur-

dened with a cause that is urged by the client's caprice or anger, has found in neither the facts, nor the law, weapons to give him the victory the client expects him to gain. Where shall he look for other weapons? He may open his case, or his defense, by stating with warmth and exaggeration, the things his client wishes to have proved. He may impugn the motives of the adverse party. He may harass the opponent's witnesses. He may lay traps for them and lead them into apparent contradiction. He may lay stress on immaterial matters and obscure the material. He may exclude evidence known only to himself and his client, that favors the other side. He may amuse the jury by bright or caustic personalities in respect to matters not relevant to the cause. He may use the weapon of eloquence in summing up and may give it keener edge, by ingenious misapplication of facts, misconstruction of motive, sophistical criticism of testimony, undeserved denunciation of parties.

Professional standards allow these things. There are not wanting, among distinguished practitioners, those who maintain that the rough and tumble way of conducting a legal battle is the best way. There are not wanting those who feel in such a struggle the "*gaudium certaminis.*" They hold that the court and jury will best get at the truth by witnessing this intemperate and confusing contest.

The court and jury do, in most instances, finally reach the truth, or its approximate; but they reach it at vast cost of time, waste of public money, and expense of temper.

And, beyond this, there is engendered and nourished that distrust of the lawyer's honesty and sincerity that wounds his sensibilities and impairs his service.

Now, the object of every litigation should be to obtain for the litigant exactly what is of right his, without adding anything to what is his due, and without subtracting anything from it. This object should be reached with the least possible expenditure of labor and time by the courts; the least practicable harm to reputation or feelings of parties and witnesses and with no sacrifice of the lawyer's self-respect. It would be the perfection of litigation

to reach correct and just results without wasting time of the court, increasing the public burden of expense, wronging adversaries, or witnesses, or detracting from the honor of the bar. Lawyers who approach this standard in the conduct of their litigations bring credit to themselves and to the bar. It is a divergence from this standard that brings discredit.

But how can the standard be maintained if lawyers must conduct such litigations as their clients ordain; may personate their clients, bad or good; may discard their own convictions and adopt the assumed convictions of their clients, in the conduct of their causes and may, with impunity, say malicious and false things about their adversaries.

To disclose the causes that may bring reproach upon the bar, suggests the remedy that should be adopted.

The lawyer should be emancipated from servitude to his client in respect to the commencement and conduct of suits.

The lawyer should control in determining what cases may be brought before the court; what suits may be begun; what defenses may be interposed. His appearance in any cause should be deemed a certificate, upon his honor as counsel, that it involves, in his opinion, the honest assertion of legal and equitable rights withheld by the opposing party. In all matters that involve conscience, whether matters of form or substance, the lawyer's decision should be supreme from the beginning to the end of litigation. The custom should be shattered, that permits the lawyer to personate the client; to argue against his own convictions; to substitute his client's morals and conscience for his own, in the conduct of his cause.

It is probable that clients would dislike to have litigation determined and conducted in the manner here suggested. No doubt many would claim that such a method would take something from their rights as citizens. No doubt they would consider their own consciences as enlightened as the consciences of their counsel and themselves as competent as their counsel to decide what proceedings and defenses should be considered just.

But, conceding the conscience of the client is no less enlight-

ened than the conscience of the lawyer, it still remains true that the client is swayed in respect to his own case, by self-interest, by excitement, by temper, or animosity, from which the lawyer should be free.

Equal rights before the courts belong to all citizens; but it should be no part of the rights of any citizen to make his quarrels or disputes a public charge, nor should it be the right of any citizen to decide what controversies are fit for litigation. These questions should be decided by the lawyer. It is for this that he has, or should have, the training of a specialist. For the just decision of these questions he should be held responsible by the courts.

The change of methods here urged will not be effected by the lawyer unaided. Many prefer the existing methods. Those who do not are unable to adopt the better method without consigning their clients to those who do.

The change will not be effected by public opinion. The public, disinterested, might approve it; but the public, individualized as clients, would disapprove. The change can hardly be effected by adjudications of the courts upon the relative rights of lawyer and client. Adjudications come too slowly, and few lawyers, or none, will make the issues that call for them.

The most effectual aid must come from the oath administered to the lawyer on his admission to the bar and the enforcement of that oath by corresponding rules of the court.

The oath now prescribed varies in the different States. The New York statute requires attorneys to take the constitutional oath. It is the oath prescribed for members of the Legislature and all officers, executive and judicial, except such inferior officers as shall be by law exempted. Its form is as follows: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of attorney and counselor-at-law in the courts of record of this State to the best of my ability." What the duties of the office of attorney and counselor-at-law are, and what their faithful performance

requires, must be learned in the schools, from the books, or determined for himself by each attorney. The form gives no instruction on these subjects and imposes on him who takes the oath no obligation more specific than would an oath to be good.

Substantially the same form of oath is used in a dozen or more of the other States — in California, Colorado, Illinois, Indiana, Iowa, the Indian Territory, Kansas, Louisiana, Michigan, Nebraska, North Dakota, Wyoming, Utah. Colorado adds the requirement that the applicant must swear that he has never been disbarred or convicted of felony.

The oath imposed, upon admission to practice in the United States Courts, Supreme, Circuit, and District, varies little from that given above. The applicant swears that he will demean himself in his office "uprightly and according to law," and will "support the Constitution of the United States."

Seventeen of the States have adopted this form with little variation. Texas adds the requirement that the attorney will discharge his duty to his client to the best of his ability; deeming as it would seem that the lawyer must do something more for his client than to demean himself "uprightly and according to law." The other States and Territories that use the same form with little variation of words are Alaska, Arizona, Arkansas, Florida, Georgia, Maryland, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Virginia, West Virginia, Wisconsin.

The Clerk of the Supreme Court of Tennessee writes, "We have no special oath in this State on record. Below is the form I generally use:

"Do you promise to support the Constitution of the State of Tennessee and the Constitution of the United States, and to truly and honestly demean yourself while engaged in practice of the profession?"

To the oath to support the Constitution of the United States and of the State and to "faithfully execute the office of attorney to the best of his ability and according to law," there is added in Kentucky an oath that the candidate for admission has not

fought a duel, nor sent or accepted a challenge, nor acted as second, nor aided or assisted any person thus offending.

This follows a constitutional requirement. The Nevada and South Carolina oaths contain a similar clause about the duel.

Alabama, Delaware, Minnesota, Mississippi, and Pennsylvania enlarge the scope of the oath beyond the forms used in the States already mentioned. The oath is that "you will behave yourself according to the best of your learning and ability and with all good fidelity as well to the court as to the client; that you will use no falsehood, nor delay any person's cause for lucre or malice."

Minnesota requires her attorneys to swear that they will behave themselves in an upright, courteous, and gentlemanly manner to the best of their learning and ability. Courtesy and gentlemanly bearing were perhaps taken for granted in the other States already mentioned. Perhaps they were considered nonessential.

The New England States have a form devised for attorneys as distinguished from legislators. It prescribes with some precision the duties that must be "faithfully discharged" by the attorney.

South Dakota and Oklahoma have adopted, in substance, the New England form. The oath required in the State of Maine will serve as the example of the New England oath. It is as follows:

"You will do no falsehood, nor consent to the doing of any in Court, and if you know of an intention to commit any, you will give knowledge thereof to the justices of the Court, or some of them, that it may be prevented; you will not wittingly or willingly promote, or sue, any false, groundless, or unlawful suit, nor give aid or consent to the same; you will delay no man for lucre or malice; but will conduct yourself in the office of an attorney within the Courts according to the best of your knowledge and discretion and with all good fidelity as well to the Courts as to your client."

This form does not, like the preceding forms, leave it wholly to the attorney to decide what he must do in order to "demean himself uprightly and according to law" or to "faithfully discharge the duties of the office of attorney and counsellor;" or

" faithfully to execute to the best of his ability and according to law " the office of attorney. It instructs him on some of the important duties of the attorney and by compelling him to reject false, groundless, and unlawful suits, gives him some power to control his client.

But despite its injunctions and prohibitions, it leaves him a wide field for the active exercise of those arts, artifices, simulations, and impersonations that have been generally characterized as disingenuous and sometimes described as dishonest.

The young State of Idaho has a somewhat novel form with a color of chivalry, yet gives the attorney no certain light. He must swear to support the Constitution of the United States and of the State and " that " he " will maintain the respect due to Courts of Justice and to judicial officers ;" " that " he " will be true to the Court and to his client ;" " that " he " will abstain from all offensive personality " and " that " he " will never reject for any consideration personal to " " himself " " the cause of the defenseless or oppressed."

Of the novel features of this form, the most important perhaps is that which pledges the attorney to abstain from all offensive personality. Under the other forms mentioned, and even under the rigorous New England form, he may be as offensively personal and as disagreeable as he will. Indeed, he receives some implied encouragement in that direction by the forms that inhibit dueling.

One only of all the United States prescribes for its lawyers a form of oath that indicates their control of their clients in respect to litigation, and that points to their freedom from vassalage. This is a State tender in years, but great in name and in aspirations — the State of Washington.

This oath, though compact, is itself an essay on the subject of legal ethics.

If it shall be enforced by the courts and lived up to by the bar, it will be one of the State's best possessions.

It runs as follows: " Obligation to be sworn to by Attorney :"

1st. I do solemnly swear that I will support the Constitution and laws of the State of Washington.

2d. That I will maintain the respect due to Courts of Justice and Judicial Officers.

3d. That I will counsel and maintain such actions, proceedings and defenses only, as *appear to me legal and just;* except the defense of a person charged with a public offense.

4th. To employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and never to seek to mislead the judge by any artifice or false statement of facts or law.

5th. That I will maintain inviolate the confidence and, at every peril to myself, preserve the secrets of my client.

6th. That I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.

7th. That I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed. So help me God."

The form of this obligation would be improved by inserting after the word "Judge" in the fourth paragraph the words "or jury," so that the paragraph would read:

"To employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and never to seek to mislead the Judge or jury, by any artifice or false statement of facts or law."

But, as it stands, it is a vast improvement upon the forms of the other States. It would be worth a crusade to have it adopted by every State and enforced appropriately by the rules of every court and kept constantly before every attorney.

Its third paragraph, by the words "I will counsel and maintain such actions, proceedings and defenses *only* as *appear to me legal and just*" makes the Counsel the one who, as between himself and his client, shall determine what suits and defenses shall come before the court and requires that such as come there shall appear to the Counsel to be not only legal but also just.

The 4th and 6th paragraphs forbid the artifices, exaggera-

tions, subterfuges, evasions, suppressions, that help to make the practice of the law discreditable.

The whole oath puts the responsibility of bringing suit, interposing defense, and of conducting either, exactly where that responsibility should be put, upon the conscience and honor of the lawyer.

To the aid that may be given the profession in adopting the better method by the oath of office and by rules of court to enforce its obligations, there should be added consistent instruction to the student in the schools. If all the law schools in the land should agree upon the principle and unite in teaching it, the improvement would be half accomplished. A long step would have been taken toward that perfection of litigation that it has been one purpose of this address to outline.

A sensible contribution would have been made to the honorable distinction of the coming Bar and to the success of coming lawyers.

All students of the law hope and wish to succeed. Every judge or lawyer who addresses them will say that, while the road of the law is steep and flinty, yet if the student toils courageously on he will find it leads to success.

But what is the success the speaker and the hearer have in mind?

One kind of success is shown by the receipt of large fees. If they are the return for large services and are the fair equivalent for that which he who pays them has received in service, they are one measure of success.

It is a success to gain verdicts from juries, if the verdicts are just, but not if the jury has been misled to the belief that the worse cause is the better cause.

It is a success to convince courts by argument, if the argument is founded on facts and law correctly presented.

It is a success to counsel clients so wisely that they can get their rights without needless expenditure of time and effort.

But it is safe to say of any able lawyer who has passed the passionate period of life, that he does not deem the verdicts he

has won to have been successes, if they have been won by distortion of facts; by undeserved invective, by unjust aspersion of character or motive, or if their winning has taken from the opposing party something that should have been left with him.

It is safe to say of such a lawyer that he does not vaunt himself upon decisions that have followed his arguments, unless he knows that his arguments have not confused the law or misled the court.

It is safe to say of such a lawyer that he does not deem his counsel to clients an evidence of success for the reason that it has helped his clients to get what they wished, unless he can also feel that it has not helped them to get what they ought not to have had.

To have advanced the cause of truth and justice is a success, whether this has been done by winning verdicts, by getting favorable decisions or by preventing needless litigation.

The success here outlined is the only kind of success that, in the retrospect, satisfies the ambitious man whose ambition is worthy. It is the kind of success that in the prospect should be alluring to the young.

On December 2, 1903, Simeon E. Baldwin, LL. D., Justice of the Supreme Court of Connecticut, delivered the second lecture of the course at the Albany Law School which follows:

LEGAL ETHICS.

ALBANY LAW SCHOOL, DECEMBER 2, 1903.

Legal ethics is sometimes, perhaps generally, thought of as an affair of lawyers. But there is no man who may not have occasion to look to it as his guard. It concerns every American citizen, for in the stately phrase of Hooker there are none who are beyond the power of courts, or without the need of their protection. The rules of legal ethics are, indeed, for the guidance of the lawyer alone. But what is the position of the lawyer in our American system of government? He is a part of it, not simply as all men are, by virtue of his vote, as an elector, but as one of the few to whom the State entrusts the administration of

its affairs. The legal profession occupies the unique position of a permanent official body.

No function of government is more far-reaching, more powerful for good or evil, more close to every man at every hour, than that we term the judicial power. It lies in our courts of justice, and of those courts every attorney and counselor-at-law is, as you know, an officer. The terms of judge and clerk and sheriff will expire, but every lawyer at the bar is an officer for life. He is, at least, an officer for life if he does not abuse his trust.

Legal ethics expresses the duties of this trust, and the whole of them. Learning and skill are required of every lawyer by the ethics of his profession, as much as are integrity and honor. No man is honest who enters into practice at the bar of any court without that amount of learning and that degree of skill which the practice of the bar necessarily demands. The community which has advanced him to this position of high official trust has the right to require that he shall be fit to undertake its responsibilities. It watches him narrowly to see if he is fit, and if it finds him honest here — honestly prepared so far as knowledge and ability are concerned — it watches him more closely still to see if he is honest and honorable in other things.

To him also it looks for certain instruction in ethics — the practical, every-day ethics of which our customary, unwritten common law is so largely the expression.

"The proper study of mankind is Man."

It is the particular study of the lawyer, and he considers men with regard to conduct. The world relies on the minister of religion to tell it of God; on the physician to explain man's physical nature; on the metaphysician to explain the laws of thought and will; but it is the lawyer to whom all men look to tell them of those duties to each other which society demands and enforces.

What one teaches he must know. The lawyer must know the ethics of his own profession before he can assume to instruct other people as to their obligations under that part of ethics which the law has taken up and assimilated for their good government.

But his need of such knowledge goes deeper and begins earlier. It springs up early in his path, when he is seeking to acquire a legal education.

The first object, no doubt, of a law student is to learn law. But he has learned it in vain, unless he has that character, and those ideals, which, to him, more than to any other man, are necessary to enable him to stand firm in his place against the temptations the world has ready for him.

When John Quincy Adams was studying law under Theophilus Parsons, he asked him whether he had better devote his evenings as well as his days to strictly legal studies. No, said Mr. Parsons. Read some of the writers on ethics. No man should enter the bar unless his moral principles are strongly established; else the necessity he is under of defending indiscriminately the good and the bad may lead him imperceptibly into universal skepticism.*

It is not that want of moral principle, that lack of a clear sense of duty, leads straight to skepticism in matters of religion. The universal skepticism of which the great Chief Justice spoke goes farther than that. It does not stop at atheism or agnosticism. It is disbelief in any real distinction between right and wrong. It is disbelief in justice itself — in that of which the lawyer is the chosen minister.

Let him not think that the community will not find it out. It is quick to detect a hypocrite; and practicing law — which is the voice of justice — without belief in the idea of justice, is hypocrisy. To one in that position, it is natural to cheat the adverse party and the adverse counsel, and the next step is to cheat his client.

The rewards of the bar, the true rewards, the rewards that last, are kept for the honest lawyer; and of honesty a nice sense of professional honor is the surest guaranty.

There are many men who fail of success at the bar. They drop out and disappear, and if you seek the cause it will not seldom be found in some departure from the rules of legal ethics.

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* Proc. Mass. Hist. Soc., Sec. Series, XVI, 349.

It is a good thing that so many of our American law schools are now giving to their students some special instruction in these rules. The purity of the bar must be maintained, or the springs of justice will be poisoned at their source.

I shall ask you to consider with me, this evening, in particular, the ethics governing the relations of the bar to the bench.

The lawyer is an officer of the court, but the judge is his superior. As in the army, so in the court-room, the superior officer is entitled to instant and unquestioning obedience. If the judge issues an order beyond his rightful authority, it is, nevertheless, while it stands unreversed, the law of the case which it concerns. Professional ethics forbids anything bordering on discourteous or offensive criticism of it, whether in the court-room or out of it.

In most countries, such criticism, if found in newspapers, constitutes a misdemeanor. Even general charges of partiality, or incompetency, against a judge of one of the higher courts, are a criminal libel by the English common law. Under our American system of popular elections there is accorded a greater freedom of public comment on judicial action, but it is accorded to the public, not to the lawyer. He has no ethical right to use that weapon, whether by anonymous communication, or over his own signature, unless as part of a serious effort to remove an unworthy judge from office. To resort to it to bring attention to a particular disposition of a particular cause would be a contempt of court; but in any other instance, it is equally a breach of professional duty.

If his client has been aggrieved by an irregular or unwarrantable judgment, there is commonly a remedy by appeal; but on appeal the action of the trial court, however justly it may be attacked as erroneous, should be attacked with the respect due to an official superior, and also with that due to one who is not and cannot be present to defend himself.

Every country stamps upon its people certain national characteristics. There is one which marked our fathers more than it marks us; the quality of reverence. It is a good quality, always and everywhere. It is good when exercised toward age.

As such it has been the staying power of Chinese institutions for three thousand years. It is good when exercised toward the glad innocence of childhood. *Maxima reverentia pueris debetur.* It is at its best when exercised by a free people toward that intangible authority we call the State. Whoever else may fail in it, a lawyer cannot. For him it is a kind of treason not to revere the power of law, and respect the dignity of those who administer it. He may be arguing some petty cause before a justice of the peace. He may be arguing a great one, before the Supreme Court of the United States, a court for States, or before The Hague Tribunal — a court for nations. In either case he owes the same respect to the authority to which the cause has been submitted.

Rufus Choate, when the leader of the Massachusetts bar, had occasion to represent the owner of land, affected by a public improvement, before a sheriff's jury, upon an inquest of damages. A young lawyer, appearing for another interested in the proceedings, treated the sheriff in an unceremonious fashion, even remaining seated when he addressed him. Mr. Choate, after a while, had occasion to take an exception, and rising as he spoke, began with: "I rise, Mr. Chairman (for I always stand in publicly addressing the sheriff of my county when acting in this capacity), to except to the ruling which has just been made." A general buzz of approval followed, which taught one man, at least, one duty which, as a lawyer, he owed to a public officer who there stood for the State.

It is this — that the judge stands for the State — that is the controlling reason for the respect due from lawyers to the bench; respect due, hard as it may be to pay it, even to the ignorant and incapable judge, for he represents, for the time being, the whole authority of government.

It is sometimes harder still to pay respect to the captious, and carping, the domineering and interrupting judge. It would do good to those of us in the profession who find ourselves upon the bench to read over every year Lord Bacon's fine essay on *Judicature.*

"An Overspeaking Judge," he says, you may remember, "is no well tuned Cymball. It is no grace to a Judge, first to finde that, which hee might have heard, in due time, from the Barre; or to shew Quicknesse of Conceit in Cutting off Evidence or Counsell too short; Or to prevent Information, by Questions though Pertinent. The Parts of a Judge in Hearing are Foure: To direct the Evidence; To Moderate Length, Repetition, or Impertinency of Speech; To Recapitulate, Select, and Collate, the Materiall Points of that, which hath beene said; And to Give the Rule or Sentence. Whatsoever is above these, is too much; And proceedeth Either of Glory and willingnesse to Speake; Or of Impatience to Heare; Or of Shortnesse of Memorie; Or of Want of a Staid and Equall Attention."

Many are the judges who by a succession of questions and interruptions will irritate the counsel to whom they had better be listening in patience, and almost tempt him to throw up his case. And, on the other hand, many are the lawyers whose arguments are a waste of time, and who first see the point of their case when it is decided against them. Bacon has both in mind, when he adds:

"And let not the Counsell at the Barre chop with the Judge, nor winde himselfe into the handling of the Cause anew, after the Judge hath Declared his Sentence: But on the other side, Let not the Judge meet the Cause halfe Way; Nor give Occasion to the Partie to say; His Counsell or Proofes were not heard."

I would not be understood as asserting that counsel never have a right to stand up in court and oppose themselves to a judicial ruling in a cause. Their duty to their client under extraordinary circumstances may demand it. It was so in the famous scene between Mr. Justice Buller and Erskine, on the trial of Dean Shipley for a criminal libel. Erskine had argued to the jury that they had the right to return a general verdict of not guilty, unless they believed the publication to be a libel. This was a doctrine made good a few years later, and largely because of this incident, by Charles James Fox's Libel Act; but not then law. The court charged the jury that if they found a publication, they

must find the defendant guilty. They came in with a verdict of guilty of publishing only. The judge informed them that the word "only" was an improper addition, and the verdict should be corrected by omitting it. Erskine at once interposed. "Gentlemen," said he, addressing the jury, "I desire to know whether you mean this word *only* to stand as part of your verdict?" "Yes," was the reply. "Then," he went on, addressing the court, "I desire your Lordship to record the verdict as given by the jury." The judge replied that the jury were evidently under a misunderstanding. "My Lord," said Erskine, "they understand their verdict." "Sir," said the judge, "I will not be interrupted. Sit down, sir, and remember your duty, or I shall proceed in another manner." "Your Lordship," rejoined he, "may proceed in what manner you think fit. I know my duty, as well as your Lordship knows yours. I shall not alter my conduct, as an advocate."*

Such cases as this belong mainly to another age and another country. But as time goes on, here in America, there may be occasions, too, when counsel, in defense of what they are claiming as their client's rights under the Constitution of his State or nation, may find themselves in like situations, and with no less warrant to save a verdict by a contention with the court. The advocate has his rights, as the judge has his.

I have spoken thus far of the respect due to the bench as the representative of human justice and of the State.

There is another reason for paying respect to the court as a matter of legal ethics.

The bar is a body of lawyers. The bench is a body of lawyers. All are engaged in administering one and the same system of procedure. All are embarked in a common cause and under the same standard. The *esprit du corps* of the profession can only be maintained by standing by one another. The judge owes courtesy to the bar. The bar owes respect to the bench.

For the same cause it owes it to itself to show respect for judicial authority outside the court-room, in mixing with the people, and sharing in the general discussions of the day.

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* Campbell's Lives of the Lord Chancellors, 8, 276.

In the opening lecture of this course, some reference was made to the form of the attorney's oath.

In many of our States, as was stated by Gen. Hubbard, and in most foreign countries, I believe, it includes a pledge of fidelity to court, as well as to client. Legal ethics anticipates this pledge. It is a necessary incident of that loyalty, which every lawyer must owe to the court of which he is a trusted officer.

He must show it in the processes which he sues out. To pervert a judicial writ to an improper use; to employ it for purposes of blackmail, or lawless intimidation; is to be unfaithful to the court. A great temptation is often felt to use a writ of attachment, perhaps against the body, perhaps against property, as a means of forcing a settlement or compromise of an unfounded claim, and one which the attorney who procures the writ knows to be unfounded. To stoop to such a trick is to betray a trust. It is to serve a client by getting not justice for him, but injustice.

And so in drawing pleadings. They are for the judges to read. They are your statement of what you assert to be the facts material to your client's case. A lawyer breaks the rules of legal ethics who so states as facts what he knows are not facts. He is, perhaps, seeking to avoid a demurrer. But it is the interest of the court and of the State that his pleadings should be met by a demurrer if his client has no real cause of action or defense. To misstate is to mislead and to deceive. Sham pleadings are too often the disgrace of the bar.

In that frank biography of Lincoln by his law partner, Herndon tells us of an incident in the great President's career at the bar that I will venture to repeat, though some of you may remember it. The firm were for the defense in an important suit. Their client was very anxious to secure a continuance, but there was no good ground on which to move for it. Herndon, as the term was about to open, happened to overhear a remark of the plaintiff's attorney to the effect that he hoped the other side would not get hold of a certain fact, as it would be hard to meet it. No such fact existed and Herndon knew it. He went to his office, however, and drew a plea in which it was set up. The plaintiff

could not demur, for the plea, on its face, was a perfect bar. He did not dare to deny it, for he thought, though mistakenly, that it was probably true. Herndon then told Lincoln of what he had done, expecting to receive his congratulations. "But," said Lincoln, "that is nothing but a sham plea. We ought not to put it in. We must withdraw it." They did, and the right to a continuance was lost.

Not another lawyer in the county, writes Herndon, as he tells the story, would have done it. And then he adds — No; but not another lawyer in the county will be remembered a hundred years hence. Lincoln will be.

Let us imagine a reversal of the story. Herndon receives from his partner the congratulations which he expected for his clever trick. Then the attorney for the plaintiff finds reason to think the plea a false one. He calls upon them to state in court whether they believe they can produce evidence of it. The truth comes out on the next motion day. It stays in men's minds. Lincoln, then, was not the honest, sincere fellow they had always thought him. He is spoken of as a candidate for Senator, for President. The story is repeated. The newspapers get hold of it. The headline artist puts it at its worst. If he is nominated, the story still pursues him, growing as it goes, and seeming less and less capable of extenuation, as party spirit colors unfriendly criticism.

If these things had happened, Lincoln would never have been President of the United States.

I would not be understood as intimating that any thought of his political future entered his mind when he insisted that the sham plea must be withdrawn. He was not one of those for whom exists the maxim that honesty is the best policy. He was from his youth and by the necessity of his nature what the people fondly called him, "honest Abe." No rules of legal ethics are needed for such men. They are their own rules.

But for most of us it is quite as well to have a chart to sail by. We may know very well the general course we ought to take. Every point we pass may be familiar. And yet, when the storm comes, the sudden call, it steadies the eye and nerves the judg-

ment to have something outside of our own selves, some written word, some accepted rule, some line marked out by other hands, to which to look for better certainty.

I have spoken of vexatious writs and sham pleas.

Let us pass to the duty of the lawyer in argument.

He is trying a cause before a weak judge, with little learning and little capacity. The adverse counsel is a man of the same sort, dull, ignorant, inexperienced. There is a point which you could make that seems plausible, and, if granted, would be controlling in your favor — one of those points, it may be, on which courts of last resort have differed, and which such a court could decide one way as fairly as another. The court of last resort in your State has, however, decided it against you. You have read this very case in the reports, most regretfully, before the trial. No one else in the court-room has ever heard of it. You are sure of this from the interlocutory rulings of the judge and objections of the lawyers. Can you ignore it, and argue that this point is decisive for your client?

If you do, you may, you probably will, win the cause. But you will win it at the expense of professional duty. You will win it at the expense of that fidelity to the court, which your attorney's oath has bound you to observe.

And here, again, the natural law of retribution works against you. The lawyer on the other side, before the time for an appeal is past, may light on this authority of which you knew and he was ignorant at the trial. The appellate court will think lightly of the professional ability of one who could advance a proposition so plainly untenable. The bar will think lightly of it, and you will sink to a lower level in their opinion.

"Law," Aaron Burr once said, "is whatever is confidently asserted and plausibly maintained." That was the principle upon which he practiced his profession, but brilliant talents and wide learning did not avail to make his professional career anything but a long succession of disappointed hopes. He was at the bar what he was in the Senate, and the bar knew him as the people knew him.

The bar is the lawyer's world. There is his professional reputation made and settled. And the bar is, in the main, a just judge. It knows itself. It knows its temptations, and it knows who, as they come, surrenders and who withstands.

One of these temptations, and one of the subtlest and hardest to resist is, in quoting authorities, to make an unfair citation. Half a paragraph from a text-book or a judicial opinion will sometimes read finely in support of the view for which you are contending, when the rest takes the life out of it by some disagreeable qualification or limitation.

Legal ethics forbids reading one, without at least alluding to the other. It is not enough to still conscience to say to yourself that if the other side want the whole brought out, they will have the opportunity to do it. It is your business not to misinform the court; and suppression in such a case is misinformation.

Nor should a lawyer ever allow himself to misquote evidence or misstate the claims made in argument by the opposing counsel. It is not only a lie: it is a mean lie, because uttered by an officer of court to mislead the court of which he is an officer. It is a sort of domestic treason.

There is such a thing as "having the ear of the court."

It can be gained without any of the graces of oratory; but not without having established your reputation, not only for clear thinking, but for honest statement of the facts and law — honest, I mean, as you see the facts to be and as you claim the law to be.

I should be far from saying that no claim of law or fact can properly be made in argument, or no objection taken at a trial, of the soundness and fairness of which the counsel making it is not himself convinced. He is not put there to decide a cause, nor to present both sides of it. His duty begins and ends with the presentation of his client's side.

There is but one limitation. He may do and ought to do whatever the client could lawfully and honestly do for himself, if arguing his own cause. The limitation is not to what his client could honorably do. It may not always be honorable to claim the benefit of the Statute of Limitations. It may not always be honor-

able to take advantage of the defense of infancy. But it is the legal right of a party to set up such a shield, and, if he desires, it is the legal duty of his lawyer to do it for him.

There is a lower standard of ethics for the client than for the lawyer. One is measured by law: the other by honor. But the lawyer's standard — that of honor — is not maintained, unless he does for his client whatever that client asks within his legal rights.

I know no better illustration of this distinction, not always recognized by the community, but a real and true distinction, than is furnished by an incident in the life of William Wirt.

A hundred years ago George Wythe was Chancellor of Virginia. He was one of the signers of the Declaration of Independence. He had been the first professor of law in America, and in one of his early classes at William and Mary College John Marshall had gained his first knowledge of the science to which he was to add so much. In 1806, at the age of eighty, he was taken violently sick, with symptoms of arsenical poisoning, and shortly afterward died. One of his nearest surviving relatives was a grandnephew, his namesake, in whose favor it had been generally understood that he had made his will. Suspicion was aroused. Inquiries were set on foot. The servants in the Chancellor's household were questioned. The cook said that on the day when her master fell sick, this grandnephew had come into the kitchen and dropped something white into the coffee-pot. The man servant had drunk of the coffee that morning, and died before his master. The coffee-grounds had been thrown out into the yard. They were examined by chemists and a large quantity of arsenic was found mingled with them. Some chickens ate of them and died. The Chancellor lived long enough to alter his will, and cut off his nephew. This wretch was promptly indicted for murder. His family applied to Wirt to defend him. After some hesitation, and on the advice of one of the Virginia judges, he accepted the retainer, and secured his acquittal.* It was easily to be obtained. The testimony of the negro cook alone could connect the defendant with the crime. The statutes of Vir-

* Kennedy's Life of William Wirt, I, 140.

ginia forbade the reception of the testimony of negroes against white men. Was it consistent with legal ethics for Wirt to insist that there was no clear evidence of guilt? It would have been inconsistent with legal ethics not to insist upon it. His client could have lawfully made the point, had he been conducting his own cause. Why had Virginia enacted such a law? Because her people believed that slave testimony was untrustworthy when introduced against a white man. The defendant had an absolute and clear right before the law to take the benefit of the statute. He had an absolute and clear right before the law to be acquitted, unless the State could bring forward legal evidence of his guilt. Wirt had nothing to do with that man's conscience. He could only ask what could my client lawfully do for himself, were he in my place? And to that there was but one answer.

An honorable lawyer may defend the blackest villain. No one denies that he is bound to defend him, if assigned to such a duty by the court. But why does the law provide for such an assignment? Because it has been found best to serve the ends of justice that convictions for crime shall be had only on free confession, or full proof made after all the opposition that professional skill and learning can fairly make in the criminal's behalf. He has then a right to defense by counsel, and counsel have a right to serve as such. I will not say that it is their duty to serve for all who ask it; but when they have engaged to defend one accused of crime or charged with any actionable wrong, such opposition as he could lawfully make, were he gifted with their office and ability, they are in honor bound to make for him. It is not the only instance in human experience in which honor leads through dirty roads.

I speak of honor, for honor is the real touchstone for a lawyer's conduct.

It may make it improper to seek what it would not be improper to accept unsought. As the Romans put it in their law: "*Quaedam enim, temetsi honeste accipiantur, inhoneste tamen petuntur.*"* The ambulance-chaser does nothing dishonest, but none the less he dishonors his profession.

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* Dig. 50. 13. *de extraordinariis cognitionibus*, 1, § 5.

There is also a solid wall of distinction between defending a client in civil causes against a judgment for what he knows and you know that he honestly owes, and bringing an action on a claim which you know not to be honestly due.

In every action, civil or criminal, the moving party must make out his case. Every defendant has a lawful and honest right to insist upon this measure of protection. Rules of court may limit it by cutting off those delays which only are properly due when a just defense is claimed. They may limit it, but not deny it.

No party, on the other hand, has a right to occupy the time of courts with groundless suits, known to be groundless by him who brings them. The lawyer fails in duty who accepts a retainer for such a purpose. I speak only of plain cases — cases without a reasonable show of merit or chance of success. Where there is a reasonable doubt, a fighting chance even, it is not improper for a lawyer to act, provided the client wishes it, after full information from him of the probable result and probable expense. No lawyer of long experience has failed to find, in many a case brought under such circumstances for an insistent client, that the client was right and he was wrong. No judge of long experience has failed to come to a final decision for the plaintiff in many a suit which, when it was first presented to his consideration, seemed absolutely baseless and even frivolous.

A decree of Napoleon, in 1810, ignored all this, and required every one, on admission to the bar of France, to make oath that he would advise no suit and make no defense which he should not on his soul and conscience believe just.* Twelve years later this requirement was swept away, and has never been restored. It set a standard of action too high for beings not gifted with more than human powers. Man is always, as Emerson says, building better than he knows.

The State of Washington, in a form of oath commended by the founder of this course before you last month, has pushed beyond

* Something like this had been enjoined in the oath for advocates prescribed in 1274 by Philip III. See Merlin, Rep. Avocat, p. 295, and Cod. 3. 1. *de judiciis*, 12.

any of her sister States, but stopped far short of the ground taken by Napoleon. Each lawyer coming to her bar must solemnly declare that, "Except in defending my clients charged with crime, I will maintain such actions, proceedings, and defenses only as appear to me legal and just." Not only such as I think just. The word "legal" is added for a purpose. It recognizes the client's right to make such claims as if honestly made the law may sanction, although were it not for such a rule of law, the rules of human justice might forbid it.

A lawyer may thus, in full conformity with legal ethics, plead to the jurisdiction, if his client wishes it, for some defect having no relation to the merits of the cause, and when to dismiss the cause is to defeat what would be justice, were there no law to support the plea.

The lawyer who thus carries out his client's will by claiming for him a strict legal advantage, on which a client with a higher sense of honor might disdain to lean, is, I believe, in the line of professional duty, and, therefore, of professional honor. For honor, though not what courts demand of the client, is what they demand of the lawyer.

Legal ethics is by no means measured by the rule of honesty. I am afraid that in our English tongue we have somewhat degraded the meaning of that fine old word. To the Romans *honestum* meant only that which was dictated by a sense of honor. A thing might be lawful, and yet not honorable, not what they understood as honest. As they expressed it in the Pandects, "*Non omne, quod licet, honestum est.*"* The French have kept this meaning better. We have let the word sink to the mere level of morality. Honor flies higher. Our profession we are proud to call and right in calling an honorable profession. Honor is the one word to express the essence of legal ethics. It is the one word, in all things, to measure the standard of a lawyer's duty. He is a combatant, a champion in a legal duel. He must fight it in the spirit of chivalry.

The Romans did not hesitate to put this fighting quality of the

* Dig. 50. 17. *de diversis regulis juris antiqui*, 144.

lawyer — this fighting for other men — as his great and true title to public regard. As they state it in their Code:* "Advocates who resolve the doubtful fates of causes and by the strength of their defense often set up again that which had fallen, and restore that which was weakened, whether in public or in private concerns, protect mankind not less than if they saved country and home by battle and by wounds. For in our warlike empire we confide not in those alone who contend with swords, shields and breastplates, but in advocates also, for those who manage others' causes fight as, confident in the strength of glorious eloquence, they defend the hope and life and children of those in peril."

Knights are not always in armor, and I ought not to conclude this lecture without some reference to what legal ethics may say as to the social relations that may be maintained between the lawyer and the judge out of the court-room.

In England, with their few and hard-worked judges in the higher courts, and with their customs and traditions as to rights of precedence and the deference to be paid to rank, a stricter rule exists than in America. Here, in many of our petty courts, the business is insufficient to occupy the entire time of the judges, and they may be presiding on the bench to-day and practicing at the bar to-morrow. Here, also, the judges in the higher courts and the lawyers at the bar stand on the same social plane, meet in companies where it would be ridiculous to appear otherwise than as equals, and are often thrown familiarly together in the daily business of common life. With few exceptions the State judiciary is made up of those who hold office not for life or good behavior, but for stated terms, which, in no event, can be prolonged beyond the time when they reach seventy years of age. With few exceptions the Federal judges voluntarily retire at the same age.

It is, therefore, a common thing here for judges to entertain lawyers at their houses, and lawyers to entertain judges at theirs, without regard to whether there are or are not causes pending in

* Code, 2. 7. *de advocatis diversorum judiciorum*, 14.

the trial of which they may all take part. I need not say that custom unites with legal ethics in forbidding conversation, on such occasions, between judge and counsel as to the merits of such causes. There is but one place for that — in court — until final judgment had been pronounced; and then if anything be said outside, there should be the utmost care on the one side to ask nothing and on the other to say nothing which could in the remotest manner have an unfavorable bearing on the dignity of the court or the interests of any party.

Within the limits that I have tried to indicate, social intercourse between judges and lawyers is a pleasant necessity of American life, and serves only to emphasize the principles on which our institutions depend for their existence.

The subject of the course in which I have had the honor to take part to-night is one of especial interest and concern to a body of students such as I address. You are part of an ancient University that has already shared something of the life of three successive centuries. There are law schools that stand alone, unsupported by university foundations, unsteadied by university influences. Such schools miss much. It is no small thing to any institution to be a vital part of a larger institution. It broadens views and elevates ideals. So does it bring responsibility.

To you, as members of Union University, legal ethics appeals with double force, for it will be for you as lawyers, by adherence to its rules, to preserve not only your honor, but hers. As was the lady of his love to the knight of chivalry, so is their *Alma Mater* to the sons of a university — to each her reputation dearer almost than his own, her fair name never to be tarnished by act of his.

LEGAL ETHICS

ADDRESS

DELIVERED AT COMMENCEMENT

OF

ALBANY LAW SCHOOL

JUNE FIRST, 1904

BY

DAVID J. BREWER

JUSTICE SUPREME COURT UNITED STATES

ALUMNI AND COMMENCEMENT DAY AT ALBANY LAW SCHOOL

JUNE 1ST, 1904

ALUMNI MEETING.

The annual meeting of the Alumni Association of the Albany Law School was held at the Hotel Ten Eyck on Commencement Day.

The business meeting was called to order at one o'clock by Gen. Thomas H. Hubbard, President of the Association.

The following officers were elected for 1904–1905.

Honorary President, David J. Brewer, '58.
President, Wheeler H. Peckham, '52.
First Vice-President, Lewis E. Carr, '64.
Second Vice-President, Adelbert Moot, '77.
Third Vice-President, J. Franklin Fort, '72.
Fourth Vice-President, Andrew S. Draper, '71.
Fifth Vice-President, Albert H. Sewell, '73.

At the luncheon which followed the business meeting, President Hubbard acting as toastmaster, Justice Brewer spoke of the earlier days of the School, he having been a student during the first decade under the administration of Amos Dean, Judge Amasa J. Parker and Senator Harris. He was followed by Chancellor Raymond who spoke on behalf of the University, announcing the issue of the first number of the *University Quarterly,* and the proposed celebration of the 100th anniversary of the calling of Dr. Nott to the presidency of Union College. Henry W. Van Alen responded on behalf of the graduating class.

Dean Fiero, on behalf of the trustees, presented to the Association, the action of the Board with reference to a new law school building, the resolution having been adopted at a recent meeting of that body, as follows:

Resolved, That a committee of three be appointed, of which committee the President shall be a member, to present plans for a school building, to inquire into, and report upon, the method to be adopted in procuring the necessary funds for its erection, and to present the matter to the Alumni and friends of the Law Department of the University for their consideration and advice.

Judge Vann in an earnest and eloquent address urged early and effective action in favor of the project, and upon his motion the Association resolved itself into a business meeting and adopted the following resolution:

Resolved, That a committee consisting of five members be appointed by the Association to consider and act upon the subject-matter of the resolution presented by the Board of Trustees relative to the erection of a new school building.

Under this resolution the active committee of the Alumni consists of Gen. Hubbard, Chief Judge Parker, Judge Vann, Wheeler H. Peckham and Amasa J. Parker.

It was further resolved that Justice David J. Brewer be named as Honorary Chairman of such Alumni Committee.

The Committee of the Board of Trustees consists of President Amasa J. Parker, Dean Fiero, Seymour Van Santvoord, Charles J. Buchanan and Edward P. White. President Parker being a member of both committees.

It is expected that the committees will meet in joint session and take such action as may be deemed advisable upon careful consideration of the whole matter.

Commencement Exercises.

The commencement exercises were held on the evening of June 1st, at Odd Fellows' Hall. Among those in attendance, in addition to the active members of the Faculty, were Chief Judge Parker, Judges Vann, Bartlett, Martin, Werner and Herrick. President Amasa J. Parker presided. The diplomas were delivered and degrees conferred by Chancellor Raymond as follows:

Students receiving the degree of LL.B., John Peaslee Badger, Jr., Henry S. Bahler, Mark Byron Bennitt, Lester W. Bloch, Charles E. Brennan, Frank Campbell Brown, William T. Byrne, William John Cahill, Stephen Elias Chaffee, Robert B. Craft,

Robley D. Cramer, Harrie McKelvey Curtis, W. J. DeLamater, Milton E. DeVoe, Nicholas DeVoe, Niram DeVoe, Nelson L. Drummond, Daniel Aloysius Dugan, Edward Easton, Jr., Maurice B. Flinn, Samuel M. Haight, George J. Hatt, 2d, Robert Babcock Haner, Harry R. Merrill, Quincy McGuire, Lawrence B. McKelvey, George Bassett Odwell, James Craig Roberts, William C. Roche, David Cornelius Salyerds, Louis Berry Shay, George H. Smith, Peter George Smith, Thomas M. Smith, Frank L. Stiles, Herbert Blakeslee Thomas, Percy J. Thomas, Francis X. Thompson, Charles Joseph Tobin, Henry Whitbeck Van Alen, John T. Van Valkenburg, Harold Wilson, Jr., Robert Newton Wilson.

Students receiving diploma, Edward R. Bootey, Jr., Lester C. Brownell, Jr., John E. Diefendorf, Robert B. Dudley, John M. Hackett, Arthur S. Hoag, Charles L. Hoey, George Webb Johnson, Charles E. Palmer, Jr., Frederick Seward Reigle, Timothy Roland, Delbert B. Salmon, James W. Sutton, Benjamin Terk, John W. Van Allen.

The address to the graduates delivered by Justice Brewer is one of the lectures in the Hubbard Course on Legal Ethics.

Justice Brewer spoke as follows:

You doubtless remember the story of the Irishman who, passing a tombstone on which was the inscription, "a lawyer, an honest man," facetiously asked why they put two bodies in the same grave. At a banquet given in honor of a distinguished lawyer the toast to the guest was, "an honest lawyer, the noblest work of God," to which a countryman promptly added "and about the scarcest." Not many years since I received a letter from a clergyman in which he asked the specific question whether I believed a man could be a Christian and at the same time practice law. Evidently "woe unto you lawyers" was a part of his creed. The question suggests a common belief that there is a wide incompatibility between personal honesty and the practice of the law. It is, therefore, pertinent to inquire whether there is any incompatibility. If in order to become a successful lawyer one must be more or less dishonest it is hardly worth while to waste time in discussing the question of professional ethics, for a profession depending on dishonesty calls for little worry about the extent to which the dishonesty is carried. It is an old adage that there is honor among

thieves, but I never thought there was need of considering the quantity of honor which should prevail among them.

So far from there being any incompatibility between personal integrity and the practice of the law, success in the practice requires the highest integrity and unfailing honesty. I do not, of course, mean that all lawyers are shining examples of high character. There are bad men in all professions, as there are black sheep in every flock. Doubtless some personally dishonest, by their intellectual skill, brilliancy in the courtroom or knowledge of the law achieve notoriety at least and not infrequently wealth, as wealth is known to the profession. But notwithstanding this concession, I insist that personal integrity is as essential to a lawyer's success as to success in any other business or profession; that a lack of it is a bar to the highest place, and that a good character is as important a qualification of a lawyer as of a minister. The work he does, the position he fills and the responsibilities he assumes all demand personal integrity.

Let us analyze these matters a little, and see if this statement is not correct. The lawyer is a counselor, and who would ever go for advice to one who, as he thinks, will deceive him? Would you in time of sickness go to a physician unless you believed that he would give you the medicine which in his judgment was that which your illness demanded?

Again, a lawyer acts for his client in negotiations with others. Here fidelity is absolutely essential. If it be generally believed that he lacks this fidelity who will employ him? Who will seek one to represent him who will not be faithful to the trust imposed?

Still again, there is no place where perhaps more reliance has to be placed upon honesty than in a courtroom. Both client and court must rely upon counsel. In all court work judges have to depend largely on the statements of counsel, and every judge knows that he does so in safety. I have been on the bench more than thirty-nine years. Thousands of lawyers in different States have appeared before me, and in only a single instance did I detect a lawyer in knowingly making a misstatement. I promptly made that public. His subsequent practice in my court was not pleasant and he soon left the State for

more congenial fields. Further than that, I do not think in over a dozen cases did I strongly suspect counsel of intentional misstatement, and I appeal with confidence to the great body of judges throughout the land if their experience has not been similar. I do not mean to say that I have not found counsel leaving out matters I think they ought to have stated, or grouping their statements in a way likely to conceal the significance of some facts, or other things of a similar nature. I mean simply that intentional misstatement by counsel is very rare. If it be said that there is, by reason of the way in which trials are conducted and through the watchfulness of opposing counsel or the court, danger in making a positive misstatement, and that, therefore, the profession is mainly influenced by the maxim that honesty is the best policy, I can only reply that it strengthens my proposition; it makes more certain that the successful practice of the law is not only not incompatible with integrity but, on the contrary, demands it. If honesty is more profitable to him than to one in other business or profession then surely success as a lawyer does not imply a want of integrity. I am not asserting that the practice of the law is an agency for the reformation of morals. I only claim that integrity does not disqualify from a successful pursuit of our profession but on the contrary tends to bring about that result. A law office may not be a Sunday school. The lawyer may know more of Blackstone than of the Bible, but the more he knows of the latter, and the more thoroughly he is inspired by its teachings, the more certainly will his footsteps touch the highest rounds in the ladder of professional success.

When we speak of professional ethics, we are apt to think of the lawyer in his office or in the courtroom, as though there was his only work of a strictly professional character, but this is a mistake. The lawyer as a lawyer has a distinctive work in lawmaking. The obligations of professional ethics go with him into the legislative halls. To that work and those obligations I desire this evening to call your attention.

The conditions of life in this republic have wonderfully changed during the last century. Formerly there were two parties, the individual and the government. Now there are three, the individual, the corporation and the government.

Between the individual and the government has come the corporation which collects individual means, organizes individual activities and assumes by collective action to accomplish more than the individuals included within it by separate action can hope to achieve. In some aspects it stands half-way between the individual and the government, and at times antagonizes both the interests of the one and the power of the other. Yet it is here, and here to stay, a powerful factor in promoting both the material and intellectual advancement of the republic.

Government is the great organization, the incarnation of all the forces of society for the purpose of securing protection, determining rights and creating obligations. True, government is not the end but a means. The Sabbath was made for man, not man for the Sabbath. The individual does not live for the government but the government exists for the individual; for the object of all human institutions, government included, is to enable each individual to round out his life to the full horizon of his capacities. But in order to accomplish this, the purpose of its being, government must be not only supreme, but also ever lifting itself up to the highest levels of usefulness. Its ideal forbids unequal distribution of benefits or classification of beneficiaries. It implies equality of rights. This does not forbid grants to individuals or classes, for grants, necessarily special, may sometimes redound to the well-being of all. Our government frequently granted land to railroad companies, but the purpose of such grants was not donations to the companies in order simply to fill the pockets of the stockholders but the promotion of the general well-being by securing those facilities of transportation which it was believed could not otherwise be secured.

If we now turn to the processes by which laws finally reach their places on the statute-books (and for convenience I shall draw my illustrations from the Congress of the United States) we notice two parties at work, the petitioner and the legislator; or, as it might perhaps equally well be stated, the lobby and the committee. The first thing that impresses one watching the proceedings of Congress is the multitude and magnitude of the interests pressing for, or opposing, legislation. This is not

strange, for we have become a mighty nation, with marvelous activities and resources, the possibilities of use of which are manifold and reaching in every direction. It is not suprising that there is a constant pressure upon Congress for legislation in furtherance of these activities and to secure the development of these resources. Washington is the great lobby camp of the world. I do not mean that the greatest corruption of legislators is there, but that there are more interests and agents of those interests seeking recognition and legislation from that, the great legislative body of the nation.

Now the counsel and advocate of these interests is the lawyer. Rightly and wisely is this so. His experience in the courtroom fits him for presenting the case of his client in a convincing and persuasive way. Advised by his client of the facts, of the general character of legislation desired, he is the one capable of presenting before legislature or committee the needs and wishes of his client and the legislation which will most effectually carry out those wishes and jeopardise other interests the least. So it is that the great corporations, especially those whose activities are of a quasi-public character and, therefore, most liable to be affected by legislation, intrust to their leading counsel less and less of the litigation in the courts and more and more the presentation of their interests before the departments of government and legislative bodies. As the counsel of one of the leading railroad companies, a lawyer of large experience in the trial of cases, said to me not long since, "I now never go into the courtroom. My work is either that of counsel or appearing for my company before the departments of government or the committees of Congress and the legislatures of the States through which our road runs." Of course, as counsel for a corporation the lawyer is under the same ethical obligations as the counsel of an individual. As an advocate before departments or legislative bodies or their committees he stands upon the same plane as the lawyer in the courtroom. Truthfulness, integrity, candor are as essential in the one place as the other. He may not excuse himself for any delinquency in these respects by the pretense that he is dealing with politicians, using that term in its offensive sense, or that all who gather

around the legislature are simply engaged in one vast grab game, each striving to secure results beneficial to his client irrespective of the mode or manner in which such results are obtained. There will be politicians about Congress as there will be pettifoggers in the courtroom, men to whom moral character is an unknown term, integrity and virtue forgotten habits of life, but the true lawyer who will engage in the work of presenting the claims of his client, be the interest of that client large or small, before any legislative body or its committees will carry into that work the highest sense of his obligations to truth and candor. In that work he bears the same relations to lawmaking that the lawyer in the courtroom does to the judgments of the court. The law enacted by a legislature should be as truly the embodiment of justice as the judgment pronounced by a court. Indeed, in one aspect it is far more imperative, because the judgment of the court may affect but the two litigants while the law enacted by the legislature may touch the interests and materially change the condition of multitudes. The true lawyer never regards the judge as the only party to a trial interested in promoting justice. While loyally serving his client he never forgets that justice should be the aim and object of all who are engaged in the courtroom. In like manner, when appearing before a legislative body, or its committees, he should never act on the assumption that the body before which he is appearing is the only one to consider the matter of justice and the welfare of the nation. While faithful to his client and fully presenting his claims and his interests he should ever remember that the law which may be the result of his efforts is a law reaching far and wide through the nation and ought to express in its highest sense the precepts of justice. As in the courtroom he will never descend to unworthy action, never indulge in intentional misrepresentation, never seek by any process of corruption to influence the tribunal, no more will he do any of these things when appearing before a legislative body. He will bear himself like the true knight of old, without fear and without reproach.

But the great work of the lawyer in the matter of lawmaking is as a legislator. It is well known that legislatures are

largely composed of lawyers. Indeed, that is often a source of captious complaint. Yet no complaint alters or will alter the fact. It is said that this pre-eminence in public service is largely owing to the assurance and loquacity of the bar. But this is a mistake. Neither assurance nor capacity for talk is monopolized by the lawyers. We must look deeper for the cause. It lies in their recognized fitness for the work.

It may be conceded that every profession, every class of business, knows what it wants; but a body of legislation expressed in separate statutes each granting that which the several classes of business and the several professions desire would be intolerable. The conflicts between the various acts, the collisions between them and the Constitution, would disclose almost a condition of chaos. Indeed, even as it is, there is too much of class legislation and separate acts devoted to particular interests without regard to the welfare of the general public. Legislation should be symmetrical as well as constitutional. The limits of constitutional power should not be passed. What has already been placed upon the statute-books and become part of the law of the land should be recognized. Legislation not only conforming to the Constitution but also harmonious with that theretofore in existence or departing from it in such manner as not to disturb vested interests or provoke misunderstandings is the ideal legislation. Now, the lawyer is the one whose studies fit him to understand more clearly than others the scope and limits of constitutional power. He is more familiar with the statutes in force, and with the judicially established significance of their phraseology. He is better qualified than any one else to frame new legislation that will, while carrying out the wishes and purposes of to-day, dovetail into that which has already been enacted; or if it changes that which is in force will do so in the most satisfactory and least disastrous manner. It is a popular instinct which recognizes this fact, and it is by reason of that and not because of assurance or loquacity that the lawyers now as of old constitute the great majority in legislative bodies.

As a lawmaker the lawyer should ever bear in mind that he is counsel for the nation. True, he is placed in his position, made a legislator, by one of the national parties. In an honorable sense he is a party man, believing that the principles of his party carried into the active life of the government will secure the best results for the people at large. On party questions he may be expected to be loyal to his party and to vote with it. Yet even in those matters he ought not to be the mere servile tool of party. Parties and party organization are a necessity in a free government. They collect and express the convictions of a great body of citizens, but whoever is made by any party a lawmaker comes under a higher obligation to the nation of which he is a chosen counsel. He is no longer a mere hand to record that which others demand but under a duty of unfailing fidelity to the great client whom for the time being he represents. We are coming more and more to realize that the independent lawmaker is, like the independent voter, a magnificent power for good in the nation. In some directions we are departing from the original thought of the founders of this government. Take the Electoral College, for instance. The idea was that a body of electors should be selected who would counsel together and choose the best man for President. That has disappeared from our history and now the electors simply record the party's choice. They have no independent action to perform. I am not here to approve or encourage party disloyalty. One is elected as the representative of a party because he is believed to have convictions along the lines of that party's thought, and it is disloyalty for him to repudiate its principles. It is one thing, however, to change party affiliations and support in the legislative body the party which antagonized him in the election. It is another and very different thing when one maintaining his allegiance to a party insists upon the right of independent advice, counsel and action on the various questions presented. Well has it been said, "he serves his party best who serves his country best," and a legislative body is far nobler and a greater blessing to the community when it becomes a counsel and ceases to be a mere counting-house.

But the vast volume of legislation is not partisan in its character. It touches rather the social, educational and business interests of the nation. And here the lawmaker though free from the demands of party is exposed to other temptations. It is true the obligation rests on every legislator, whether he be a lawyer or not, to regard the interests of the nation as for the time being intrusted to his hands and to act for its interests. But the peculiar knowledge and fitness of the lawyer for lawmaking gives him as a rule superior influence in the legislature and places him under, therefore, higher obligations to guard those interests. *Noblesse oblige.* The lawmaker is exposed to temptations from three sources, and they press in some respects more strongly upon the lawyer than upon any other. First, from persons. He may be actuated in securing legislation not by any desire to benefit the nation but to subserve the interests of some personal client. Let me illustrate by an actual occurrence. A client was indicted for an offense. His counsel was a member of the State legislature. The punishment fixed by statute was moderate. Counsel secured a postponement of the trial until after the session of the legislature on the ground of his personal engagements. In the legislature he introduced a bill repealing the existing law and providing a larger penalty for the offense. He made an earnest speech urging that a severer punishment was necessary to put a stop to such offenses prevalent as they were and hurtful to the community. He was successful and the bill became a law. When the trial of his client came on he pleaded that the repeal of the prior statute without a clause continuing it in force for crimes already committed prevented any punishment Whether the greater punishment prescribed by the new act was really beneficial to the State as a whole is immaterial. The lawyer was recreant to his obligation to the State, the client whose counsel he was in the making of the new law. He betrayed the client by whom he was then employed in behalf of another for whom he had a different employment. He was acting precisely as if he had advised one individual client to a course of action beneficial to another client, and this without regard to the interests of the

client then consulting him. It is a universal obligation binding upon every member of the profession to be absolutely loyal to the client for whom he is at the time acting. It is as old as Scripture that no man can serve two masters. Any act done by a lawyer as a lawmaker to further the interests of a personal client without reference to the general weal is disloyalty to the State or nation for which he is then acting as counsel.

Again, locality is a temptation, and its temptations have an air of plausibility and respectability which make them a constant danger. One elected to Congress not unnaturally says "I am here to represent the locality which has placed me here. I am to look after its interests, and that is a primary obligation. The Representatives from other Districts will do the same, and if by a combination between several we can secure that which is beneficial to our Districts we have simply done our duty to those Districts." But the Representative's first duty is to the nation and not to the District. He is counsel for the nation and although under obligations to the District those obligations are subordinate to that which he owes to his real client, the nation. Justice Lamar, when a Senator from Mississippi, was instructed by its legislature to vote in a certain way. He declined to obey the instructions, declaring that his convictions of what was right and best for the nation at large forbade. He realized that he was a chosen counsel of the nation, and in that capacity was bound to act as his judgment of the best interests of his client, the nation, demanded. There is a large field in which a Representative may rightfully consider the interests of his District. His constituents have many things demanding his services before the departments and in Congress, attention to which involves no breach of his trust as a lawmaker of the nation. Cases arise in which there is a single amount to be expended, a single institution to be established, a single result to be obtained, and the place in which this is done is immaterial. There a Representative may rightfully exercise all proper means to secure to his District the benefit of that which is proposed. No one can truthfully say that he is then acting disloyally to his present client, the nation. But a

very different condition exists when as legislator he strives to secure for his District something which the interests of the nation do not require, and especially when he and others combine to deplete the treasury for the benefit of their Districts, without regard to the general welfare. The latter is common in congressional history. In the parlance of Washington "the river and harbor bill is the great pork barrel." And unless common rumor be sadly wrong not infrequently a pool or syndicate is formed of members to carry the bill through, the condition of each individual's entrance to which is an appropriation for some government work in his District. More than once have Presidents indicated their disapproval and wished it within their power to veto certain appropriations included in the bill, but under the necessity of approving all or none have finally let the bill become a law though including unnecessary and improper appropriations. Talk about professional ethics, about loyalty to the higher obligations of the profession, when such combinations are made by the counsel of the nation to deplete its treasury. Not all who go into such schemes are lawyers, but the fact that there are lawyers who do enter into them and often engineer the schemes shows a lowering of the standard of professional ethics. It is little if any better than the grab game for self which so often disgraces the councilmen of our municipalities. It is not to be wondered at that in many States constitutional provisions have been enacted by which the executive may veto part and not all of an appropriation bill, thus enabling an honest executive to baffle the syndicate and cut out the dishonest while saving the honest appropriation.

But after all, to-day's great temptation to the lawyer as a lawmaker comes from the marvelous development of corporate interests. The corporations themselves are colossal in size, alluring by the magnitude of their achievements, tempting not merely by the money they possess and with which they can reward, but more by the influence they can exert in favor of the individual lawmaker in the furtherance of his personal advancement. No one can be blind to the fact that these mighty corporations are holding out most tempting inducements to the lawmaker to regard in lawmaking their interests rather than the welfare of

the nation. Senators and Representatives have owed their places to corporate influence, and that influence has been exerted under an expectation if not an understanding that by them as lawmakers the corporate interests shall be subserved. I am not here to deny the value of corporations. I realize the magnitude of the work that is possible through such combinations, and I do not deny their right to be heard before any legislative body in defense of their rights or in furtherance of their interests. But the danger lies in the fact that they are so powerful and that the pressure of so much power upon the individual lawmaker tempts him to forget the nation and remember the corporation. And the danger is greater because it is insidious. There may be no written agreement. There may be in fact no agreement at all and yet when the lawmaker understands that the power exists which may make for his advancement or otherwise, that it will be exerted according to the pliancy with which he yields to its solicitations, it lifts the corporation into a position of constant danger and menace to republican institutions. I do not mean to insinuate that all legislators are influenced thereby. On the contrary, I know there are many and I trust they are a large majority who stand in the full integrity of their being, acting always in accordance with their judgment of the best interests of the nation; but within the limits of our profession, as elsewhere in the world, are many weak characters who, while they might not deliberately do a dishonest thing or deliberately prove false to an oath or obligation, yet yield to the pressure of corporate interests, deluding themselves with the idea that those interests are synonymous with the interests of the nation.

I am not here to croak as a pessimist, but it is the part of wisdom and courage to look a danger in the face and do what can be done to avert it. And one thing which I wish to present to you, young gentlemen of the graduating class, and to press upon your thought, is that professional ethics reach beyond the courtroom and accompany the lawyer into the legislative halls where he acts as the counselor and lawmaker of the nation. If you shall be honored in the days to come, as doubtless many of you will, by places within the great legislative halls of the

nation, bear in mind that loyalty to your client goes with you there, that your client is the republic and not an individual or a district or any corporate interests.

What a client, and how great the privilege of being its counsel. Glance backward and from the vantage-ground of that retrospect look forward and thank God for your opportunity. Three centuries ago no Anglo-Saxon had a home within the limits of this nation. The Indian traveled through unbroken forests and over untilled prairies. Civilized life, constitutional government, farms, cities, schools, churches, courts, the ministrations of science and the glory of the fine arts were all unknown. To-day how changed. The comforts and riches of civilized life are on every hand. No nation makes a grander showing of the marvelous capacities of national usefulness. None has written into national and international life in more glowing words the lofty thoughts of highest ethics. Towering above the nations and nearer the summit she hungers for the opportunities of the future. Before her is the open door. As her counsel, advise her well that her every movement in the coming days shall be a step forward. Thus shall it come to pass that humanity rejoicing in her benedictions will thank God for her lawyers and counselors.

Young gentlemen, forty-six years ago I stood where you stand, receiving from this institution its certificate of my qualifications to practice law. Narrow then were the limits of my professional horizon. Law was a business out of which I might hope for support and through which I might possibly obtain political preferment. It was linked in my mind almost exclusively with the thought of self. While I had, as all young men have, visions of usefulness and some glimpses of the grandeur and glory of the profession they were like the cold and distant splendors of auroral lights. As the years have passed the horizon of life has been constantly widening. Each year greater and grander seem to me the work and the life of the true lawyer. More and more I realize his value to the community and the nation. His personal experience may be expressed in the oft quoted sentence, "work hard, live well and die poor;" his life may seem to him "only this and nothing

more." But he enters as does no other into the varied experiences of human life. He is the helmsman of the community and the pilot of the State. He is striving to incarnate into the life of the republic the rule of justice, and in so doing he is working as none other for its enduring glory. Science through its varied efforts may transform the material condition. It may fill the land with visible splendor and accumulated wealth. It may perfect the highways of commerce; redeem the arid lands and make the wilderness bud and blossom as the rose; extract from beneath the surface its concealed wealth, and take from mother earth all that it can give for the support and well-being of our citizens; but when all that is accomplished if justice has not been wrought into the national life, it will descend through luxury and dissipation to ruin. For it is written by the finger of the Almighty on the everlasting tablets of the universe that no nation can endure and prosper into and through whose life does not run the golden thread of equal, exact and universal justice.

We speak of the beauties of nature and art, the wondrous charm there is in those things which appeal to us through the sense of vision, but more beautiful than anything made of material substances is that fabric of civilization which humanity toiling beneath the dome of time has been working into our social and political life. There is nothing in the universe that is grander or more beautiful than the fabric as unrolled before us at this, the beginning of the twentieth century. All of human thought and feeling; all of human hope and aspiration; all of human self-sacrifice and denial; all of heroic effort and achievement have passed into its structure and color. Beautiful as it may be, and there is naught, as I say, in all the physical universe to compare with its beauty, it will crumble into dust and be forgotten as the civilization of Babylon, unless into and through every part of it there runs one thread, and that the thread of equal, exact and universal justice. That thread, brethren of the bar, it is especially your work and mine to run. Upon us, as upon no other workers in our civilization, is the duty cast of seeing that this single thread of justice runs

through every part of the fabric, and God grant that it may be your privilege and mine that as to that particular portion we weave into the fabric it shall be so pure that nothing shall tarnish its lustre and so strong that no temptation shall break its fibre.

LEGAL ETHICS

ADDRESS

Delivered at Commencement

. . . OF . . .

ALBANY LAW SCHOOL

MAY 31, 1905

. . . BY . . .

IRVING G. VANN

Associate Judge of the Court of Appeals


THE ARGUS CO
ALBANY

Alumni and Commencement Day
Albany Law School
May 31, 1905.

Alumni Meeting.

The annual meeting of the Alumni Association of the Albany Law School was held at the Hotel Ten Eyck on Commencement Day.

In the absence of the President, Hon. Wheeler H. Peckham, who was detained by illness, the business meeting was called to order at one o'clock by Lewis E. Carr, First Vice-President.

A committee was appointed to report officers for the ensuing year. The Treasurer and Secretary made and filed reports. The committee to select officers reported as follows:

To the Alumni Association:

Your Committee on Nominations respectfully reports that in view of the marked ability and judicial integrity of our distinguished alumnus, United States Supreme Court Justice David J. Brewer, of the Class of '58, the office of Honorary President of the Association be again tendered to him, and we recommend that he be elected thereto to succeed himself.

We further recommend the following officers for the ensuing year:

President.....Andrew S. Draper.
First Vice-President.....D-Cady Herrick.
Second Vice-President.....J. Franklin Fort.
Third Vice-President.....John M. Kellogg.
Fourth Vice-President.....Milton A. Fowler.
Fifth Vice-President.....Thomas B. Cotter.

EXECUTIVE COMMITTEE.

Samuel S. Hatt, Richard C. S. Drummond,
William S. Bennett, Frederick E. W. Darrow,
Leopold Minkin.

Secretary.....William R. Whitfield.
Treasurer.....Melvin T. Bender.

Dated May 31st, 1905.

W. E. WOOLLARD,
GEORGE V. S. WILLIAM,
R. C. COLEMAN,
J. MURRAY DOWNS,
A. D. DENNISON,
Committee.

The report of the committee was adopted and the Secretary, on motion, cast one ballot for the names so reported.

The business meeting then adjourned.

The annual luncheon of the Association was given at the Ten Eyck, Lewis E. Carr presiding. In addition to an address by Mr. Carr, Andrew S. Draper, Joseph A. Lawson and George E. Griffin, president of the graduating class, made brief addresses.

Commencement exercises were held in the evening, and the following members of the graduating class received the degree of L. L. B.:

Adams, Harold James
Austin, Lewis Merton
Baker, Clarence Pritchard
Bascom, Wyman S.
Bootey, Edward R.
Benton, Henry Wakeley
Bodman, Charles S., Jr.
Collopy, John William, Jr.
Dawes, Claude Thomas
De Santis, Anthony S.
Donnan, George W.
Fenster, Joseph George
Flinn, Daniel S.
Gallup, Earl Howard
Griffin, George Edward
Hatch, James A.
Healey, William John
Higgs, Charles Arthur
Jamieson, Edward Cash
Jones, Leland C.

Kerr, Harry David
Lawrence, George Frederick
Lynch, Martin Frank
Morse, George Le Grand
Murphy, Sherman Arnold
Norton, W. Ward
Pratt, W. Fred
Schenck, Gilbert V. E.
Shoecraft, J. Donald
Slade, John A.
Sinclair, Claire
Sleicher, George Ingalls
Smith, Albert Edward
Smith, Frank Marks
Smith, John Taylor
Stetson, Frederic T.
Sweeting, Schuyler K.
Taylor, Marsh Newton
Throop, Walter S.
Tillott, Thomas R., Jr.
Toohey, Henry
Van Buren, Alfred D.
Vanderlyn, Joseph H.
Van Horne, Orange Lathrop
Woods, Thomas
Zimmer, William B.

The following having been in attendance one year, preceded by one or two years of study in an office, received diplomas:

Alverson, Claude B.
Conger, Seward A.
Cook, Andrew J.
Coughlin, John B.
Frazer, McIntyre
Flint, Orin Q.
Harrington, Denis J.
O'Connor, A. Lindsay
Shufeldt, Augustus
Sullivan, Benjamin

Judge Irving G. Vann delivered the address to the graduating class, the address being one of the lectures in the Hubbard course on Legal Ethics. Judge Vann's address follows:

Contingent Fees.

Mr. Chancellor, Ladies and Gentlemen and Gentlemen of the Graduating Class.— In preparing to address the young men who graduate to-night, I tried to select a practical subject, even if it should prove a dull one. Instead of giving general advice in relation to professional conduct, I have thrown together some thoughts, the best at my command, upon a specific subject, which impresses me as of the utmost importance to the generation of lawyers who have the future of the legal profession in their keeping. It relates to traffic by lawyers in lawsuits, with especial reference to the effect of the modification, which amounts to a substantial repeal in certain cases, of the statutes against champerty. I ask each earnest

young man before me, as he stands upon the threshold of his professional life, to erect a standard of action for himself in relation to taking claims to prosecute upon a contingent fee and to the abuse grossly known as "ambulance chasing," which has sprung from that practice. As of possible aid to your judgment in making up your minds, I submit the following views for your consideration.

Propriety of professional conduct does not spring from statutes, or from judicial decisions, although it may be aided or injured by either, but from that high sense of honor which has come down to us from the ages, as shown by the lives and precepts of noted lawyers for nearly a thousand years. This has varied as each generation presented new questions to be solved. The standard has fluctuated from time to time, somewhat through sympathy with the general moral standards of the age, although the careful reader of history will note that it has never sunk so low in the law as in many other walks of life.

Each generation has struggled with its own problems and the duty of ours, as it seems to me, is to resist to the utmost the growing tendency to make money the standard of success in the practice of law. Real success at the bar is not measured by money. While it may include money, it must embrace something more, or it is not success in the true professional sense. Unless the practice of law promotes the administration of justice, the bar should be abolished and the license of every lawyer revoked by the State, for the community should not be put to the expense of maintaining an institution which it does not need. A lawyer should be a minister of justice, in a large way if he can, but if not, then according to the ability which nature has given him and the opportunity which circumstances afford. His object should be to see that so far as in him lies, justice is done. This does not mean that he should abandon his client, or help the other side, if he becomes convinced that it is right and his own side wrong, for he may not sit in judgment on his client's cause and decide it. That is not his function, for every one has the right to have his claim passed upon by the courts and decided according to law. After a lawyer has accepted a retainer, it is his duty to uphold

his client's cause upon its merits and to place that duty far above any hope of gain to himself.

The law is a learned profession, not a trade, and its primary object is not to make money, but to aid in the administration of justice. While a lawyer should make a living out of his profession, and a good living, the aim of his life should not be the accumulation of wealth. If he wishes to heap together great possessions, he should choose some other calling. If the ambition of one's life is to become rich, it is not for him to practice law, any more than to preach the gospel. The simple practice of the law does not lead to wealth, although it should create a competency. The great lawyers of the past, as Henry Clay once said, worked hard, lived well and died poor. Unless you are willing to work for something besides money, you are not fit to practice law. Wealth is not an evil. A merchant, manufacturer or banker may with propriety strive mightily to become rich, for his vocation is a business, not a profession. This, however, is not true of the lawyer. He does not accumulate through the labor of others, or by hiring a multitude of men to work for him, but by his learning and experience he protects the property, liberty and lives of his fellow citizens, and if the hope of accumulation alone leads him to the bar, he degrades a noble profession from the outset and will never meet with great success. As Governor Tilden, himself a great lawyer, once said: "If the bar is to become merely a method of making money, making it in the most convenient way, but making it at all hazards, then the bar is degraded."

In all highly civilized countries the position of barrister, advocate or lawyer has been one of importance and dignity, so long as the practice of law was regarded as a profession and not a trade, but it has invariably fallen from high influence into disrepute whenever it has been turned into a money-making pursuit.

Gibbon, in his great history, speaking of the decline of the profession in Rome, says: "The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into the hands of freedmen and plebeians, who, with cunning, rather than skill, exercised a sordid and pernicious

trade. Careless of fame and justice, they are described, for the most part, as ignorant and rapacious guides, who conduct their clients through a maze of expense, of delay and of disappointments from whence, after a tedious series of years, they were at length dismissed when their patience and fortune were almost exhausted."

What happened in Rome from practicing law simply to make money may happen to us, for human nature has not changed by the lapse of twenty centuries, and, as the lawyers who wrote and inherited the great system of the civil law fell into decadence from corruption and the love of money, so may our noble profession decline from the same causes. If there is a tendency downward in any part of the profession and that tendency is growing so there is danger that it may become general and result in widespread demoralization, it is the duty of those who love the practice of the law to expose and correct it. If wrong exists in our midst, it must be set right by the bar itself, for reformation, to be effective, must come from within.

The commercial spirit, which, to an alarming extent, has invaded the bar, is the cause of many abuses, and among the most serious is the setting on of lawsuits for the simple purpose of making money. Litigation should never be encouraged. The ideal lawyer is always a peacemaker, and counsel who stir up lawsuits are a curse to the profession as well as to the body politic.

While this evil is not new to the law, it has of late years grown to dangerous proportions. Champerty and maintenance are not words of recent origin, but are almost as old as the common law itself. Champerty is an abridgment of *campum partire,* which mean to divide the land. In remote times when nearly all wealth was in land almost all lawsuits were connected with land, and lawyers made their living largely through their knowledge of the law relating to real estate. The temptation frequently arose for an attorney to make use of his knowledge, experience and skill by inducing persons to commence or defend actions of ejectment upon his promise to prosecute or defend at his own expense, provided, in case of success, he should have part of the land involved. This agreement with a plaintiff in a suit to recover the possession of land

in consideration of a portion thereof was known as champerty. Although confined to land at first, the abuse finally extended to every subject of litigation. The action was brought and prosecuted by the lawyer at his own expense and the proceeds, whether land, chattels or money, were divided between the lawyer and client upon the basis of an agreement made in advance. Attorneys agreed with their clients to thus collect a particular claim, or claims in general, and to receive a certain proportion of the sum collected as compensation for their services. This grew to be such an abuse that it was made an indictable offense, whether, in the first instance, by some statute now lost to history, or by the inherent growth of the common law, which has always developed a remedy to meet an evil, is not known. Many statutes were passed upon the subject, but all, as it is supposed, in affirmance of the common law and expanding it in some respects as the evil grew. A champertous bargain was void because it was an agreement to do something against public policy, and the making of the bargain was an indictable offense. The old books are full of cases where such bargains were adjudged void and the parties thereto punished as offenders against public justice. Champerty extended to the purchase by an attorney of the subject matter of an action, or of pretended rights or titles and to making loans or advancing money on the security of a claim intrusted to him for collection. Until very lately it was the policy of the law to prevent, through direction or indirection, "the traffic of merchandising in quarrels and of huckstering in litigious discords." "The purchase of a lawsuit," as Chancellor Kent once said, "by an attorney is champerty in its most odious form, and it ought to be condemned on principles of public policy. It would lead to fraud, oppression and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character to speculate in lawsuits. The precedent would tend to corrupt the profession and produce lasting mischief to the community."

Maintenance, a lesser evil of the same general tendency as champerty, is the intermeddling of a stranger in a suit in which he has no interest by assisting one party to continue a litigation

against another without lawful authority. This also was made a criminal offense, punishable by fine and imprisonment. It is not a widespread evil in modern times, and I will give it no further notice, for it is to agreements which formerly were champertous, but now, to a great extent, are not, that I wish to call your attention.

While statutes in most of the States still prohibit attorneys from directly purchasing claims, or advancing money thereon with the view of bringing actions to collect them, the law against champertous agreements has been much relaxed and evil has resulted from the change. The object of the Legislature was judicious, but in attempting to prevent one evil it created another, and, it may be, a greater. So many unscrupulous clients defrauded their attorneys by making dishonest settlements and after getting the proceeds into their own hands, refusing to pay for the services by which they were obtained, that the Legislature authorized attorneys to agree with their clients as to their compensation for services and gave them a lien upon the subject of the action, which attaches to the verdict, decision or judgment and is not affected by any settlement made by the parties.

The statute in this State, which is known as section 66 of the Code of Civil Procedure, although passed for a good purpose, opened Pandora's box and let out the evils which the ancient law against champerty was designed to prevent. It was intended to help a poor man, with an honest claim, who could not afford to pay counsel for commencing or conducting a suit to collect it. It enabled him to employ an attorney by giving him an interest, by way of lien, in the subject of the controversy, so that in case of success his compensation would be secure. A lawyer might work for years as the case passed and repassed through the courts without getting any pay, but, if he finally succeeded, his lien protected him and he could receive compensation out of the proceeds of the litigation. The client could not deprive him of it by collusion or fraud, for the lien covered the subject of the action, which, to the extent of the lien, virtually became the property of the lawyer. An action of this kind thus becomes, in part, the action of the attorney who carries it on, for without success he receives nothing, but

with success he is entitled to collect his proportion. He may do a thousand dollars' worth of work with no pay, or he may get two thousand dollars for services worth but half that amount. In all these cases the agreement is that, unless he succeeds, he is to charge nothing for his services, and frequently it is also a part of the arrangement that he is to advance the disbursements and thus to carry on the litigation at his own expense. Under these circumstances the temptation to succeed through unscrupulous practices is distinctly presented. Anything which appeals to the weakness of human nature and tempts it to go astray is an evil. None of us may profess superior virtue until we know how we would act under like circumstances, but a direct encouragement to do wrong, held out by the law itself, must inevitably result in wrong doing to a greater or less extent. The law now enables a lawyer to make his client's cause his own in the pecuniary result and thus tempts him to succeed by right methods if he can, and by wrong methods if he must. It leads him to look upon success, whether right or wrong, as necessary, for otherwise all his work will bring him nothing, and all the money he has paid out is a dead loss. There are many cases in our reports where success, according to the first story told by the client, became impossible by the decision of the courts upon appeal, yet on another trial the client, by telling a different story to fit that decision, finally succeeded through a complacent jury, misled by sympathy for a poor man, or prejudice against a rich corporation. Did some one so talk with the client as to present the temptation to stretch his conscience up to the point required by the circumstances? Who suggested the missing link, the necessary lie? Who permitted the client to reverse his story and pave the way by a plausible explanation? Who was morally, if not legally, guilty of subornation of perjury? Who made it possible for the client to change the story and yet preserve the semblance of truth? Who asked the jury to believe the falsehood and exerted his talents to persuade them to accept it as the truth? Where does the responsibility rest, wholly or in part, for perverting justice and turning the court into an agency of wrong? The client had the verdict, the lawyer had his part thereof secured, but where were honesty,

right and justice? What is to become of a profession which tolerates such conduct on the part of any considerable number of its members? How long can it retain the confidence of the community if it permits this menace to society to go on unchecked? While an attorney is not the keeper of the conscience of his client, he is the keeper of his own conscience and responsible for his own acts in conscious violation of law and justice. He has no more right to encourage his client to deceive than he has to deceive himself.

It may be that in some of these cases the clients were honest in telling both stories, but in the nature of things such instances are rare. The moral presumption is against such a witness, although the courts feel compelled to submit his credibility to the jury, who, according to our law, are the final judges as to questions of fact.

More frequently the defect in the evidence is supplied by a new witness, who is called for the first time upon the second trial, granted solely on account of such defect. In a majority of cases, according to the judgment of all impartial observers, the new witness tells a perjured and manufactured story. Occasionally he may not, but generally, I fear, he does, and, notwithstanding the course taken by trial courts in cautioning juries to scrutinize with suspicion the account of the latecomer, they are apt to find as if they believed it to be true, although what they really find is an equitable verdict, according to their notions of equity. Ask any reputable and disinterested member of the bar who heard the trial and he will tell you, and his experience enables him to judge with accuracy, that in all probability the witness was not telling the truth. Who procured the witness? Presumptively, the client, but why did he not get him in the first instance? Who told him what was necessary? Who told him that he must fail, unless he found such a witness? Often the client is an infant, or, if an adult, too ignorant to do the work for himself. Who did it for him, or caused it to be done? Was the interest of the client the only interest to be promoted by the perjury? Who was tempted to do this evil thing, and who knew how it could be done? Who was the partner of the client and shared in the plunder?

These are suggestive questions, and in some instances the

imputation they convey may be unjust, but I am speaking of general, not of particular cases. Some things are morally certain, yet frequently they cannot be proved, and bribery and perjury are among them. I admit that a heavy responsibility rests upon the client, but in these cases the lawyer, to the extent of his interest, is his own client, and there lies the root of the evil. The temptation should be held out to neither lawyer nor client, for its tendency is to demoralize both. Frequently the work of fabricating evidence is not done by the attorney, as he keeps in his employ a skilful man to look up evidence, who knows what is needed and earns his salary by getting it. Is responsibility for the wrong evaded in this way? Is it not rather increased by bringing another man into the corrupt circle? Here, also, sweeping statements may be unjust, for some of the persons employed as process servers and to look up evidence are honest and upright men, who would scorn to bribe or suborn, but I speak of the tendency and the general result.

It is the duty of lawyers to avoid even the appearance of these evils and to so conduct themselves that they are free from suspicion. In no other way can they hold up the reputation of the bar and relieve it from the aspersions brought upon it by the conduct of unworthy members. An upright lawyer never says of an evil thing: "Others do it and I must." The moral tone of the profession should be such as to make a lawyer who indulges in these disgraceful practices feel that he is shunned and despised by his fellows as a liar and a scoundrel. All over the State of New York, and, as I am informed, in other States also, the bar is suffering to-day in the mind of the public on account of the general belief that in actions involving personal injuries the practice of bribery and perjury is common. This may be unjust, but it is a fact and one which you young men will have to deal with for the protection of yourselves and of the noble profession to which you are now called. What is the best way to deal with it? How can the demoralization of the bar, already widespread, as many believe, be arrested and corrected? What course is better than to remove the temptation which a statute of the State now holds forth to lawyers of easy conscience?

There are other evils, which, in my judgment, are distinctly traceable to the statute which gives attorneys a direct pecuniary interest in the result of the action. Who has not heard of ambulance chasers? If a definition is necessary, let me quote from the language used by the President of the Medical Society of the State of New York in his late annual address to the members of that representative body of learned men: "There are lawyers," he said, "known to the bar as ambulance chasers, who have runners constantly on the watch for accident cases of which they learn through the daily papers. These unscrupulous members of the bar, with the aid of equally unscrupulous members of the medical profession, rob corporations of thousands of dollars every year. I cannot say that I see any difference in the culpability, or that the doctor is more blameworthy than his principal, the lawyer who brings the suit, which is often built up out of manufactured evidence. They are a pair of precious rascals. I seek to excuse neither. It is the system, however, which renders their partnership possible." While I feel at liberty to speak plainly of my own profession, I do not thus speak of the medical profession, but simply quote the words of their representative. Within a few months the following item was widely published in the public press: "A priest has handed $550 to the manager of a New York city railroad company, saying, as he did so: 'This money was obtained from you in a damage suit by one of my parishioners, who has confessed to me that a lawyer coached her and induced her to perjure herself. Her conscience troubled her, she confessed to me and asked me to return the money.'"

In one of the great cities of the country, not in this State, however, I am glad to say, there is an organized business association, with stockholders and capital paid in, the sole business of which is to procure and prosecute negligence cases. The company has its regular counsel, a choice corps of ambulance chasers, procurers of witnesses and the like. It advances the necessary expenses and takes cases for a proportionate part of the recovery.

I recently heard of an instance where a brother and sister were killed in an accident at a railway crossing, and within less than two hours after the mutilated bodies had been carried

home six different lawyers asked leave to sue the company in consideration of one-half the sum that might be recovered.

A peculiar case was recently brought to my attention. An accident happened which resulted in death, and a lawyer, who had no acquaintance with the family, sent flowers on the day of the funeral, with his professional card attached. Happily, when he called a few days later, he was turned from the door.

It is the belief of all trial judges with whom I have conversed upon the subject, and it is my own belief, founded on many years of observation as a trial judge, that ambulance chasing leads to manufactured evidence, with the bribery and perjury, without which evidence cannot be fabricated.

Did any one ever hear of ambulance chasers before it was made safe by law for attorneys to take cases on speculation? Whoever heard, until late years, of law offices organized to solicit business, with a corps of retainers expected to distance the doctor and the coroner, printed contract in hand ready for prompt execution by simply filling in names and dates? Can you imagine the great lawyers of the past, the fathers of the profession, who cherished and protected it during their lives and transmitted it to us as one of the most exalted callings, ever doing or countenancing such actions? Can you think of Chief Justice Marshall, Alexander Hamilton, Chancellor Kent, Daniel Webster or any other revered member of the bar even acting as counsel upon the trial of a case prosecuted by an attorney under such circumstances? The mere suggestion of it would have left them speechless with indignation. Do not, I beg of you, think for a moment that these strictures apply to lawyers generally, for the unworthy members are limited as yet, but the number is growing, and it is the duty of every one who loves the profession to do what he can to check the evil.

While the solicitation of business is not forbidden by law, it is forbidden by the precedents and traditions of the profession. The methods of conducting a grocery cannot be adopted by lawyers without descending to the level of grocery keepers. Lawyers in the past have been looked to as the natural leaders of society. They should always be qualified for this high distinction by attainments, conduct and character. They are sworn officers of the courts, and the judges cannot

administer justice without their aid. They assist the court and jury by doing what the client, for want of learning and experience, cannot do for himself. They are the guardians of right and the enemies of wrong. They have peculiar powers and privileges affecting the public welfare, and their duties are of corresponding importance. It is essential to the dignity and usefulness of the profession that they should have the confidence of the courts and should be regarded with respect by the public at large. They cannot have that respect, unless they deserve it by honorable and high-minded conduct. How can they secure it if they walk the streets begging for business, or send their agents into sick rooms and hospitals to solicit the right to sue for an injury before the blood has stopped running from the wounds of the victim?

For time out of mind it has been the duty of a lawyer, in a proper case and when ordered by the court, to prosecute or defend a civil action for a person, who, through poverty, is unable to pay for legal services. When assigned by the court he is required by statute to conduct the prosecution or defense without compensation, and the person thus suing or defending *in forma pauperis* need pay no fee to any officer, lawyer, sheriff, clerk or constable. The earliest act upon the subject was passed in 1494, only two years after the discovery of America, and even then it was but a confirmation of the common law previously existing. So, lawyers upon the assignment of the court constantly defend poor persons who are charged with crime, without reward or the hope of reward, except the consciousness of doing their duty as members of the profession. They do it ably, willingly and zealously in the interest of humanity and in honor of the bar. Such unselfish conduct is a badge of honor, and is recognized as such by the best elements of society. Contrast the result of these statutory duties with that of the statutory privilege upon which I am dwelling. The tendency of the one is to strengthen and of the other to weaken the profession, not only in the estimation of good men generally, but in the estimation of lawyers themselves.

I think these evils, as well as others which I have no time to mention, are largely traceable to the statute which I criticise so severely. That statute makes them possible, for the

attorney virtually purchases a portion of the claim and agrees to pay for it in professional services. Contingent fees have always been regarded as dangerous in their tendency, but this practice is more dangerous, as the attorney virtually becomes a part owner of the cause of action he is prosecuting. The lien given by the statute is in practical effect the ownership of a part of the cause of action and is so thoroughly protected that no settlement can defeat it. While personal actions, such as those founded on negligence, are not assignable generally, they are thus made assignable, in part, to the very persons, who, of all others, should be prohibited from acquiring an interest therein. The plan to divide the recovery usually agreed upon in negligence actions, which are largely conducted under these speculative arrangements, ranges from one-fourth to one-half of the amount collected, in addition to the taxable costs. This frequently results in extravagant compensation. Verdicts for $5,000 in such actions are common, while judgments for twice that amount are not unusual. Very much larger sums are occasionally recovered and from one-fourth to one-half of the recovery, in addition to the costs, frequently gives compensation far beyond the value of the services rendered, even when the risk of loss by failure to secure a verdict is taken into consideration, as in justice it should be.

The element of speculation enters largely into business of this kind, and history shows that speculators, for time out of mind, have not been over scrupulous in their methods. Is it not sound legislative policy to protect the legal profession and the community in general by removing the temptation now constantly held out by the law itself? Is it not better that there should be some cases of hardship and injustice, occasional instances when lawyers are defrauded by their clients, than to undermine and drag down a great and useful profession? It must be admitted that there were evils which this legislation removed, as it was a serious wrong for a dishonest client to take all the fruits of the lawyer's hard work and pay him nothing for his services. This was not unusual when there was no statute to protect the attorney by giving him a lien upon the cause of action. Great as this evil was, however, it did not tend to lower the tone of the profession or to demoralize

members of the bar. If evils are to be balanced, as sometimes they must be, the adjustment should be so made as to protect both the lawyer and the layman, with as little injury to either as is possible; but, above all other considerations, regard should be had to the standing and dignity of the great profession of the law. At every hazard of mere pecuniary loss to the lawyer, his honor must be preserved, and his professional reputation kept free from stain. He cannot be useful to society, unless society has confidence in his integrity. No one can suffer more from the imputation of dishonesty than the practicing lawyer.

Contrast the effect of this legislation with that resulting from the reverse policy pursued by Congress with reference to the pension claims of veterans in the Civil War. The Revised Statutes of the United States provide that no attorney shall demand or receive any other compensation for his services in prosecuting a claim for pension, or for bounty land, than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding the sum of twenty-five dollars. The pensioner having been thus carefully protected, equal care is taken to protect the attorney, for it is provided that the disbursing officer of the government shall deduct the fee going to the attorney from the amount of the pension in his hands before paying it over. Any violation of these provisions by attorneys is punishable by a fine of not more than $5,000, or by imprisonment, or by both, in the discretion of the court. Any pledge, mortgage or transfer of a pension, or of a claim for a pension, or of any interest in a pension is declared void, and the making of the contract therefor is made a misdemeanor. Pensioners thus get their claims substantially in full, because they cannot sell, pledge or transfer them. Pension attorneys and agents receive compensation, which, it must be admitted, is small, but they are willing to accept it, and there is no reluctance on the part of competent attorneys and agents to prosecute claims for the compensation allowed by the laws of Congress. Imagine for one moment, what would have become of the poor pensioners, the brave old soldiers, their widows and children, if the federal law threw the subject of compensation for prosecuting their claims open to agreement and protected the agreement

by lien, as our State laws open the subject of compensation for legal services in all cases that can be brought in the State courts. Is there any doubt that many of the pensions which now relieve the veterans of our wars and their families would be owned by pension attorneys, agents and speculators?

The question that I present to you, gentlemen of the graduating class, as the guardians of the honor of our profession in the future, is: "What is best for the people generally?" And as incidental thereto and really a part of it: "What course is best to secure a high-minded and honorable bar?"

It may be that the statute should be modified rather than repealed. All will doubtless agree that every lawyer should have a lien upon the papers in the case and upon the subject of the action to the amount of his taxable costs, without any agreement upon the subject, except such as is implied from the retainer, or contract of employment. As the amount of the taxable costs is fixed by law, the attorney is entitled to that amount in any event and no abuse can well arise from such a provision. But the taxable costs are seldom adequate to compensate for the labor involved in protracted litigation, and some further provision is desirable, provided it can be made with safety.

The next step suggested is that the contract for increased compensation, in addition to the taxable costs, should be in writing and filed with the county clerk before it becomes a lien upon the cause of action. Publicity would appeal to the lawyer's pride and would affect his standing and thus would be some protection against unreasonable or extortionate agreements.

The last suggestion is that no part of the proceeds of the litigation, whether arising from judgment collected or settlement made, aside from the taxable costs, should be paid either to the attorney or client until the amount of compensation for services has been approved by the court, upon summary application. The amount should be paid into court to await such approval, which should not rest wholly on the agreement of the attorney and client, whether made in advance or at the time of the application, but should also depend upon the amount of work done and the risk of getting any pay whatever, owing

to the uncertainty attending all litigation. In other words, the court should be empowered and required to fix an amount not exceeding a certain sum or proportion that would be just and equitable to both parties under all the circumstances.

I make these suggestions with diffidence, for I appreciate the difficulties and dangers which surround the subject. I feel that my strictures are stronger than the remedies I am able to suggest, unless it is the radical remedy to repeal the statute altogether. The client needs protection, for the cause of action is his. The attorney needs protection, so that he may receive fair and just remuneration for his services, skill and learning, as well as the risk that he necessarily runs. The profession needs protection, so that its members may not be tempted to sacrifice dignity and honor for the sake of gain. If a statute could be so drawn as to accomplish these three needs, it would be a blessing to the community and to the bar, whose real interests are identical. While no statute can make a man honest, it may remove some of the temptations to dishonesty.

Gentlemen of the Graduating Class: Even if prepared with all the care and wisdom possible, no statute can take the place of a high standard of action on the part of the members of the bar themselves. That has been the protection of the profession during the honorable years of the past, and it must be its main protection in the years to come. Integrity and courage have been the watchwords of the great lawyers of all generations. Independence of thought and action, under the law and according to law, for time out of mind, has been the child of the bar, fathered by its noble members and guarded at every hazard of personal loss. Resistance to despotism has not been confined to the usurpations of the executive, but has extended to the tyranny of courts and judges; to the overwhelming power of public opinion, hastily formed under the influence of great excitement and a thoughtless press; to the arbitrary conduct of trusts, of labor unions and to oppression in any form and from every source. The men who have cherished, protected and defended liberty; who have resisted public injustice and by calm argument and courageous action have arrested tumult and given time for sober thought, have been lawyers to a great extent. The profession, with its grand history, will deal with

the emergencies of the present as it has in the past, and, as I confidently believe, will stamp out the evils to which I have made allusion. It is in the hope that you, young men, who now enter upon the practice of the law, may be led to reflect upon the evils, to avoid the dangers and to aid in applying a remedy for the abuses mentioned that I have ventured to make these suggestions.

I wish you, gentlemen, one and all, an abundance of success, in its highest sense, in the noble profession to which we are all glad to bid you welcome.

LEGAL ETHICS

THE DUTY OF THE HOUR

LECTURE

DELIVERED BEFORE THE STUDENTS OF LAW DEPARTMENT OF UNION UNIVERSITY

By

William W. Goodrich

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of the
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SECOND DEPARTMENT

1905


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THE DUTY OF THE HOUR.

Lecture Delivered in Hubbard Course on Legal Ethics.

The munificence of one of our Alumni has enabled the Faculty of the Albany Law School to invite men who have been in touch with the affairs of the profession and of the world, to address to the senior class some words of kindly counsel upon the ethics of the profession; counsel, gathered not only from the experience of the lecturer in the practice of his profession, but also in the larger survey of the things that have been done and the things that remain to do.

I have had grave doubts whether I could add anything along the lines suggested in the addresses of the Founder of this course of lectures and of the other eminent lawyers who have spoken, and, therefore, I have concluded to consider another duty devolving upon you as members of the coming bar. I shall not dwell upon the need of industry and application, nor of your single-minded duty to protect the interests of your client. Such words of counsel you have heard, and will hear from others. It is my purpose to impress upon you the great deeds heretofore done by your brothers in the cause of American freedom and to urge upon you to follow in their footsteps, so far as opportunity and your own natures give you the chance. Perhaps this may be done best by suggesting the wide influence which your profession will confer upon you, on living questions of public life and development, in the hope that your ambition may be roused to do the duty imposed upon every American lawyer. As Professor Burgess has said, "Jurisprudence has its base in ethics and must develop with the upholding of the common consciousness of right and wrong."

No student can read the history of England and the United States without being struck by the differing parts which lawyers have played in the development of the two countries. It is a

fact that the growth of England toward freedom, and the development of her institutions have been little aided by the members of our profession; it is also true that both in the establishment of our own form of government and in its amazing growth, the legal profession has been preponderant, not only numerically, but also in the quality of intelligence. With this thought in mind, I ask you to direct your attention to the history of the United States during two important periods and to the influence of lawyers therein; and also to the present-day problems and the ethical burdens laid upon you by reason thereof.

I do not stop to discuss the reason why England has an unwritten Constitution, nor why the United States has seen fit to put hers into writing. I call your attention to the fact, and suggest as one reason for the preponderance of American lawyers in the growth of American freedom, that the lawyers are more definite and accurate thinkers than the laity, and, having before them a written Constitution, they have proceeded to enlarge and interpret it, keeping ever in mind the need for the broad foundations of democracy and the widening of its functions.

No careful student of history can fail to be impressed by the influence which the legal profession has exerted upon civilization and progress in all nations and in all ages, and especially in our own country during the past century.

Nor is this fact a cause of wonder. The State is founded upon law. The lawyer, from study and experience knows, or ought to know, what laws are best adapted to changing conditions, for, as conditions change, the laws necessarily change with them. In our democratic land he naturally gravitates to public affairs. Like the minister, he is an oracle of village life, and in cities he is accustomed to deal with civic questions. He has always been what the liberal training of his profession makes him, a champion of freedom and a leader of human thought and progress. The world has made vast advance in all matters of legislation and law, justice and liberty during the last century, and the lawyer has always been in the forefront of the struggle.

There were fifty-five signers of the Declaration of Independence, thirty-two of these were lawyers who thus put life, liberty and property at the risk of success. It was a new and startling state-

ment of the right of the people to self-government and came upon the world like a thunderbolt from clear skies.

Since the birth of the Republic every national Congress has been very largely composed of lawyers. I need only refer to a recent Congress, consisting of four hundred and forty-seven members, of whom three hundred and twelve were lawyers.

It is thus apparent that historically the lawyers have played a predominant part in two great periods of American history. The first period is that of the formation of the Constitution.

The bickerings and the jealousies of the States after the close of the Revolutionary war had demonstrated that the Union of the States, loosely federated by the Articles of 1777, could not be maintained without a more definite, accurate and binding pronouncement of the relations of the States toward each other and toward the nation which they purported to establish. The fruits of a successful revolution had been garnered; the domination of England was at an end; the heroism and sacrifices of the sparsely-settled colonies, the little fringe of settlements along the Atlantic coast, had left a liberty-loving people free to work out in their new country, untrammelled by precedent and foreign interference, a great experiment in democracy. There were no charts for the mariners on that wide sea, yet, undaunted, as was Columbus when he set forth on his western course for the passage of the Indies, the Americans of 1787 fearlessly set sail on democracy's broad waters, determined that the voyage should make a chart for their own guidance and for the use of other adventurers upon that unknown sea.

The preponderating element in the Constitutional Convention of 1787 were the lawyers. Of the fifty-five members, thirty-five were lawyers, of whom nineteen then were or afterwards became judges; and, I may add in passing, that of the twenty-four Presidents of the United States, subsequently serving, nineteen were lawyers. An examination of the debates of the convention shows that the lawyers not only took the lead in the discussions of the convention, but that their influence was always on the side of freedom and order. Their story is the story of men who determined that the liberty they had won should be defended and perpetuated. The charter which they drew contained in abundant measure provision for the protection of the rights of

one State as against another; but it also contained provisions needed for the growth and development of a great nation. As we survey their work after the lapse of one hundred and eighteen years and bear in mind the history of the national growth, we are amazed that any body of men could have been so wise, so far-sighted, so wide-visioned as this group which foresaw and planned a great nation.

Mr. Gladstone once said: "As the British Constitution is the "the most subtle organism which has proceeded from progressive "history, so the American Constitution is the most wonderful "work ever struck off at a given time by the brain and purpose "of man."

John Fiske calls it "The Iliad, the Parthenon or the fifth "symphony of Beethoven, * * * two complete and well-"rounded systems of law, the State Law and the Federal Law, "each with its legislative, its executive and its judiciary, moving "one within the other, noiselessly and without friction. It was "one of the longest reaches of constructive statesmanship ever "known in the world."

The only criticism of their work which the men of to-day may make is that they were too rigid and inflexible, in that they made their written compact too difficult of amendment.

An important ethical question which touches the members of our profession perhaps more closely than any other citizens, is the attitude which you should assume toward the matter of the amendment of the Constitution. You will remember that it requires the consent of three-fourths of all the States in order to amend our organic law. Historically all of the amendments that have been passed were either normally a part of the Constitution, that is, the first to the twelfth; or were adopted as the result and under the pressure of the Civil War, that is, the thirteenth, fourteenth and fifteenth. Very many amendments have been proposed, but they have failed of adoption, and it is safe to say that the Constitution is practically unamendable by the method provided by its framers. This is the result of the cumbersome method adopted by the Constitutional Convention of 1787.

On the other hand it is safe to say that no set of men is wise enough to legislate for all posterity. A nation's growth demands

changes in its organic law to meet new conditions. England's Constitution is unwritten. It may be enlarged or modified by the acts of Parliament, that is, by the will of the people expressed through their representatives. Radical modification is improbable in view of the intensely conservative character of the people. Hence, the changes in the organic law of Great Britain are made solely in response to national demands; but at least they are made.

In the United States, however, a method has been found of amending, so to speak, the Constitution through the decisions of the Supreme Court. I yield to no one in my respect for the Supreme Court. In the last analysis, it is the keystone of our national edifice. It is to the government what the balance wheel is in machinery. It was neither an imitation of, nor an evolution from, any tribunal previously existing. It was an absolute invention of the convention. For the first time in national history a court was created whose function it was to pass upon all other branches of the government, the Constitutions of the States and even the Federal Constitution itself. This court has been called "the crowning marvel of the wonders wrought by the states-"manship of America, embodying the loftiest ideas of moral and "legal power. * * * No institution of human contrivance pre-"sents so many features calculated to inspire awe and veneration. "It is a tribunal of which the ancient world could present no "model, and the modern world boast no parallel, whose decrees, "woven like threads of gold into the priceless and imperishable "fabric of our constitutional jurisprudence, would bind in the "bonds of love, liberty and law, the members of a great republic." Yet twice, at least, in the history of the court the rule of *stare decisis* has been violated by that court, first, in the Legal Tender Cases, and, second, in the Income Tax Cases.

Your training, gentlemen, has been to respect the rule of *stare decisis* and to apply the old law rather than create new law by decisions. This, then, is the question of the ethical responsibility upon you: Shall you throw your influence hereafter in favor of the inviolability of the Constitution and its amendment only by the method prescribed in the instrument itself; or, believing that it is practically unamendable, is it your duty to ask the Supreme Court, should occasion arise for you so to do, to cast aside the precedents of the earlier days in order to interpret the

Constitution in such a way that the nation's growth may be advanced and not retarded, that new problems, unforeseen by the framers, shall be solved in a new way? It is a dangerous principle to admit that we may disregard the Constitution; and all your training has tended to create respect and obedience for already-established law. Yet, on the other hand, it may some time become necessary not only for the growth of the nation, but, indeed, for its preservation, that the written law of the land be disregarded. I leave this question with you with the suggestion only that the violation of the Constitution tends toward anarchy, while a literal compliance with it may stifle national growth.

Great as was the period of the formation of the Constitution the period that followed, the period of interpretation, is to my mind quite as great, if, indeed, not greater. It is a period marked by the eminence of one man, John Marshall, Chief Justice of the United States from 1801 to 1835. I venture to say that the history of no other court shows a preponderance of power like that of John Marshall. He was the fourth Chief Justice and the most eminent and influential of all. He had not been a member either of the convention that led to the Articles of Confederation of 1777, nor of the Constitutional Convention of 1787, but he had been in public life as a member of the Virginia House of Delegates and a member of the Council of State as well as one of the envoys sent to negotiate a treaty with France. He had made some mark as a lawyer at the Virginia Bar. His qualifications for the position of Chief Justice were not widely known, although Washington had offered him the Attorney-Generalship in his Cabinet, and Adams had urged upon him to accept the appointment of Chief Justice of the Supreme Court. This, at first, he declined, becoming, however, Secretary of State in the Adams Cabinet. But in 1801 he accepted the Chief Justiceship and for thirty-four years he was at the head of that court.

It will be an interesting study for you in the leisure of your summer to examine the early volumes of Cranch, Wheaton and Peters, which contain the decisions of Marshall, and to observe how the Great Chief Justice dominated his court. In ninety per cent of the cases in which he was engaged, that is, the cases in which he was not prohibited from acting by reason of his interest or having taken part in the decision below, the opinion of the

court is the opinion of Marshall. In all of the constitutional questions he was without precedents to guide him. No such instrument had been before the courts of England; the common law, rich and fruitful in suggestion as it was, could aid him only indirectly in helping to develop a nation's growth; but Marshall had, as perhaps no man in America before or since, the instinct and the passion of nationality, and he evolved as from his inner consciousness the breadth and scope of constitutional authority and its limitation. He declared that the Supreme Court had the right and power to pronounce an act of Congress null and void, if, in its opinion, such an act violated the Constitution. He averred that the principles of the common law were founded upon justice and common sense and that they were flexible and adaptable to the settlement of new disputes between man and man, although they threw little light upon relations between State and State. But far beyond this, he averred that in the United States the first great experiment in democracy, with inherent and ineradicable purposes of freedom, could best be developed on large national lines and by the growth of a powerful central authority. He knew that the articles of the confederacy meant disunion and halting growth, and that the Constitution of 1787 had in it the means and the terms of a great national development. Having these things in mind John Marshall, the greatest of the Federalists, consistently and persistently strove to develop a nation and to check the forces of disunion. So that I say that the period of John Marshall, in the development of the Constitution and of a great nation under it, was as great a period as the period of the formation of the Constitution.

Professor Bryce says of Marshall: "The Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed. That admirable flexibility and capacity for growth which characterize it beyond all other rigid or supreme constitutions, is largely due to him."

President Garfield said: "Marshall found the Constitution paper, and he made it power; he found it a skeleton and clothed it with flesh and blood."

Daniel Webster, another lawyer of this period, stands almost as great as Marshall. He ranks highest among the men who

argued for the integrity of the Union and against nullification and the right of a State to secede; he was the greatest of the constitutional lawyers of his period and was prominently the apostle of nationality. His argument was not for the creation of a new nation, but it was the exposition, as an existent fact, of a nation created by and based upon the Constitution, and in that position he never faltered.

It is indeed the duty of the lawyer to regard first and always the interest of his client; that duty is well stated in the familiar words of Lord Brougham in his speech in defense of Queen Caroline:

"An advocate, by the sacred duty which he owes to his client, "knows in the discharge of that office, but one person in the "world — that client and none other. To save that client by all "expedient means, to protect that client at all hazards and costs "to all others, and among others, to himself, is the highest and "most unquestioned of his duties; and he must not regard the "alarm, the suffering, the torment, the destruction which he may "bring upon the other. Nay, separating even the duties of a "patriot from those of an advocate, and casting them, if need be, "to the wind, he must go on, reckless of the consequences, if "his fate it should unhappily be to involve his country in con-"fusion for his client's protection."

But Marshall and Webster, and the lawyers in the constitutional convention, were fortunate in having, so to speak, the whole people for their client. It is in large measure because of their unswerving devotion to the interest of that client that we have to-day a united and progressive country.

Present Problems.

The work of the constitutional group created for the United States a firmly defined and well planned democracy; the questions of political freedom in this country were settled once for all as the result of the labors of the constitutional convention of 1787. The labors of John Marshall and Daniel Webster, the judicial and the legislative advocates of freedom, created the sentiment of nationality and union which unified the North in the Civil War, and resulted in a triumph of arms which settled forever the question of nationality.

Every age has its problems, and Divine Providence raises up men to solve them. These two great problems of the past, that the people are supreme, and that this is a nation, having been settled, it behooves you, as brothers of the great lawyers of the past and successors to their traditions, to approach in their spirit the problems that will confront you.

I think you will agree with me that no further problem of the union of the States composing the nation is likely to be presented. The relations of the States between themselves and of the States toward the Union have been solved by events, and the United States to-day is a unified nation; strong to receive and assimilate the heterogeneous masses which immigration is thrusting into our country.

But the questions of freedom are not yet all settled. Political freedom has been assured, and it is safe to say that there will be no departure from the terms of the settlement; this country is governed by the people thereof, and, no matter how great a temporary success any men or group of men attain in shaping the policies of the country, nevertheless, the ultimate power being lodged with the people, the people will assert their power and impress their convictions upon the policies of the country.

I desire to call your attention to two sets of problems which confront us: Those of the United States in foreign relations, and those of the United States in domestic matters; and to say that the ethics of our profession imposes upon you the duty of aiding to solve these problems in the same spirit which Franklin, Hamilton, Jefferson and Madison brought to the constitutional convention, and Marshall and Webster brought to the period of nationalization.

In the last fifteen years the position of the United States in international matters has completely changed. Prior to 1890 the United States in foreign matters was a negligible quantity. We had no colonies; we did not interfere in European matters, and our sphere of foreign activity was confined to the negative position stated by the Monroe Doctrine, that there should be no European aggrandizement in this hemisphere. But Mr. Cleveland's message in regard to Venezuela, and the results of the Spanish War, have brought a change. We have taken a positive position in the world's affairs, and we have acquired

colonies. It is your duty to exert, as far as in you lies, your influence in international questions toward a sane and simple attitude. We are not concerned with the problems of Russia and England in India; with France and Germany in Morocco, or with the struggle of the great powers for territorial aggrandizement in South Africa; but we are concerned, for the sake of our trade, for instance, that no nation shall seize China for its own spoliation. It would seem proper, therefore, that you should support the efforts of the State Department under this administration looking to an even chance for all nations in the undeveloped countries of the world, a policy which has for its justification, not the sole advantage of the United States, but an equal opportunity for all.

As the result of the Spanish War we have the Philippines and Porto Rico; Hawaii prior to the war had asked for union with us; Cuba is bound to us by ties of gratitude and interest. Does it not seem right to you that in our colonies — Porto Rico and the Philippines — as hitherto in our territories, the aim of our policy should be to create self-governing, educated communities, rather than dependencies? Historically the United States has stood for freedom. It was the first great experiment in democracy, the rule of the people. I urge upon you the principle of freedom for these peoples, the same freedom that we ourselves have secured. I do not discuss the time when the freedom should be granted. I desire to enter into no political controversy, but I ask you to carry into your thought and discussion of the colonial problems the same thought that Jefferson and his associates carried into the War of the Revolution, namely, that it is an inalienable right of a people to govern themselves after their own desires. It is better to blunder in a democracy than to prosper under an autocracy, for even the blunders of democracy make for progress, while the prosperity of an autocracy menaces the future.

In matters that affect domestic relations the problems are much more complicated. The Fathers of the Republic thought they had solved all questions of freedom when they established political freedom. So far as their day and generation were concerned they were right, but they could not foresee the tremendous industrial change of the last fifty years. The

problems which the industrial change has created are quite as serious as the problems of political freedom, but the same spirit which solved the latter is adequate to solve the former. I ask you to bring to the solution of these questions the same sanity and earnestness, the same desire for freedom, as the apostles of democracy brought to the earlier problems.

America has developed so fast in material prosperity, and the captains of industry have rendered the country and the world so great a service in that development, that we are sometimes prone to believe in the right of the men who have done this work to retain all the fruits of their toil. I think you will not disagree with this assertion of right, provided, first, that there has been no violation of law in obtaining the fruits, and, second, that the public has not suffered by the work of these men. But I ask you to carry into your thought and discussion of public questions one principle by which all questions must be solved; that principle is contained in the old legal maxim *salus populi suprema lex;* and I further ask you to give to the word *salus,* safety, a somewhat wider meaning than its etymology connotes. I ask you to define *salus* as meaning prosperity, and progress, and order, as well as safety.

In the questions of the trusts, of municipal ownership, of the tariff, of the increase in wealth, your touchstone should be the interest of the people.

To take a concrete example: Throughout the United States transportation companies, the steam, surface, subway and elevated railroads have come under the control of a small group of men. The census of 1890 disclosed the fact that the transportation companies owned one-seventh of the assessed property of the country. Their employees have formed unions and associations for the purpose of protecting themselves, and such unions are the only weapons in the hands of the employed. But the functions which the employers and the employed perform are public functions; the transportation business, passenger and freight, is not a private business; it concerns most of all the persons whom, and for whom, it transports. It is the right of the public to demand of the companies which are operating under franchise from the State and cities that the service shall be safe, commodious, rapid and uninterrupted. Lockouts and

strikes, because of relations between employer and employed, are of no concern whatever of the public. The public has the right to demand, as I have said, safe and uninterrupted service. Your sympathies may be with the employers, because of the belief that the men are lawless and overreaching in their demands, or they may be with the employed, because of the belief that the operators of the road are oppressing the men and beating down wages in order to make dividends on watered stock. I have here no concern, either with the employers or employed as such; but with the public whose rights are inconvenienced by these private quarrels, whose lives are imperiled and sometimes lost, whose convenience is utterly disregarded, I have the utmost sympathy; and I ask you, therefore, to bring to the discussion of all these problems of public utilities an attitude absolutely antithetic to the famous attitude of William H. Vanderbilt that "The public be damned;" I ask you to assert "The public be "saved." If it be necessary that the interest of the traveling public be protected by a compulsory arbitration law which shall forbid the employer from locking out or the employed from striking, is it not your duty to advocate such a law? The private quarrels of men, under the form of democracy which we have developed, are not settled by the pistol or the bowie-knife, but in the courts of law, because the safety of the public requires it. Private vengeance, says democracy, shall not be had. Let us also say, industrial vengeance shall not be wreaked either by an employer in discharging his men and shutting down the operation of its road, or by the employed in striking and thus again shutting down the operation of the road. Is it not possible to do what New Zealand has done, *compel* both sides to arbitrate, meanwhile continuing to perform their public functions without interruption and without menace to life, and limb, and property?

And so on the question of trusts and the great aggregation of capital which place control in few hands. I do not urge upon you any *a priori* considerations as to the right of the few to control the industries and activity of the many from any standpoint of the employer or his employees; but I ask you to approach the solution of this question from the standpoint of the interests of those not directly affected in the industry whose control is thus centralized. Are the trusts, by their doing away with com-

petition or their economies in operation, or their avoidance of waste, performing a public service, or is the public better served by free competition and uncontrolled division of the industry? Are the trusts another step in the evolution of industry from the journeyman to the shop, from the shop to the partnership, from the partnership to the corporation, and from the corporation to the corporation of corporations? I do not seek to control your judgment on any of these questions, except by asking you to translate again the motto *salus populi suprema lex* into the terms of modern industrial life; to keep in mind always that the interest of the people must be the ultimate standard of judgment. That was the standard of the great men in our profession, whose deeds I have already recounted.

Lincoln once said: "He who moulds public opinion goes "deeper than he who makes statutes or pronounces decisions. "He makes the execution of statutes and decisions possible."

I have no doubt that many of you will become ardent Republicans or ardent Democrats; will stand for non-interference by the government with private enterprises or for State control; will range yourselves on the side of the laboring men or with the corporations; will come to believe that there is no tyranny like that of wealth, or, no tyranny like that of organized labor. I care not what your sympathies from heredity or experience may be, but I ask you most earnestly to bring to the solution of all the questions which your profession will thrust upon you two convictions: First, that democracy, as a method of government, has come to stay, and, second, that the needs of public safety are the highest law. With these two convictions in mind, however widely you may differ, you cannot go astray in the solution of the problems that will be presented to you in your professional life.

LEGAL ETHICS

LECTURE

DELIVERED BEFORE THE STUDENTS OF THE ALBANY LAW SCHOOL

IN THE HUBBARD COURSE ON

LEGAL ETHICS

By

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LEGAL ETHICS.

A Lecture Before the Students of the Law Department of Union University in the Course Founded by General Thomas H. Hubbard.

The benevolent and upright founder of this course of lectures felt that broad as is the range of legal principles, and ample and attractive as is its field for the exercise of the highest intellectual and moral attainments, yet the true office of those who are licensed by the government to practice in the law as a profession is to aid the people of the State and the State itself in the observance of the law and in the administration of justice. That to fall short of that end may indeed be incident to human limitations; but to fall short through the abuse by its practitioners of the ethical principles which such a license for such a purpose plainly implies, would seem to justify an educational effort to secure a more general recognition of those principles and to support them by a firmer moral demand for their observance.

Professional ethics, except as they are enumerated in the oaths required of those admitted to practice, and the cases in which the courts have disciplined members for such malpractice as has been injurious to their clients or in contempt of the authority of the courts, seem to rest in that consensus of opinion which prevails among its most honorable members. This opinion, theoretically, at least is expected to be recognized, and the sense of honor which should always attend upon learning, character and privilege, as both ornament and shield, should always suffice — not so much for its enforcement as for its unfailing self-operation

I do not know that any Legislature or bar association has attempted to formulate in concrete detail a comprehensive professional code. A general code might thus be stated: "In the practice of his profession the lawyer shall advise and act in all matters undertaken by him, lawfully, honestly and faithfully, to the best of his ability." This will do very well for plain cases in which the distinction between right and wrong is not obscure. But the lawyer is often employed because this distinction is obscured or is sought to be, and his expert services are sought to aid either in dispelling the obscurity, or to assist in taking advantage of it. No special pilot is needed in the plain sailing of the open sea; but is taken on board when the port to be gained must be approached through a tortuous channel beclouded with fog and beset with reefs and shifting shoals. It is perhaps better that rules of the profession should not be reduced to exact details, lest, as the opponents to the codification of the common law contend, the spirit be cramped in the letter and be overlooked or disregarded in the study of the text. A text invites verbal construction, often to the sacrifice of the spirit. A right spirit is the life of professional honor, and, to him who does not feel it, rules are but words.

It is probably true that no other body of men has a keener practical sense of the requirements of honor and duty than a great majority of the great order of lawyers. They devote their lives to the consideration and application of the duties and obligations which men owe to each other in the relations in which they are actually placed. With them these are not mere academic questions to be considered in the abstract, but concrete questions arising out of actual conditions upon which life, liberty, property, peace, prosperity and happiness actually depend. It is rare that two cases are exactly alike, and thus counsel must carefully consider how far varying facts affect or vary his duty or obligation.

If the question is to be submitted to the court, counsel must be prepared to make such suggestions as he thinks are pertinent to the solution of the question. If he is giving

his client advice, the responsibility rests upon him to advise his client truly as he believes his legal rights to be.

Even the most sublime of general precepts, like this from St. Paul, for instance:

"Whatsoever things are true, whatsoever things are honest; whatsoever things are pure; whatsoever things are of good report; if there be any virtue and if there be any praise, think on these things" may simply confuse and bewilder, unless counsel fits them to the case in hand. My experience on the trial bench gradually led me to omit attempting to explain the law to juries, but rather to tell them that if they found the facts to be this way, the law required this verdict; if that way, that verdict. In like manner, I think counsel must himself resolve all abstract or general propositions into the concrete result, and give to his client the practical results, without much hoping to make a lawyer of him in an hour or two.

The clear cases, such as, thou shalt not lie, steal, or bear false witness, or the many things specifically named and forbidden in the Holy Scriptures, and among all civilized peoples, speak for themselves; they are self-forbidden. But there are many actions or omissions whose quality, character and effect depend upon their relation to the particular facts of the concrete case. They often lie so near the border line that seen through the light of interest, or selfishness, or perceived by a defective or deadened sense of honor, they seem to be upon the right side of the border, when a truer light shows them on the other side.

It is such cases that the true lawyer is peculiarly fitted to solve as they arise. The general principles of right action which stand approved by the members of the bar whose professional lives are without fear or reproach, and are felt rather than acquired by the upright, furnish the unwritten law of professional ethics.

We accept, as of course, every rule of right action which the positive law of the land declares. And we must heed every prohibition of the violation of such law. This is an

important part, but it is only a part of a professional code. You must distinguish between what your clients may rightfully demand of you when you accept a retainer, and what they may not; and of course what they may not rightfully demand, you may not rightfully do. It is always true that your client is entitled to his legal rights as the law declares them, and when you accept his retainer you agree to use to the best of your ability all honorable available means to advance or protect his rights. If, for any reason satisfactory to yourself, you think it is dishonorable for him to insist upon his legal rights, you should decline his retainer — not accept it, not palter with it. For example, his only defense may be the Statute of Limitations; you cannot without his consent waive this defense. You can refuse to accept his retainer, if the circumstances compel you to think such a defense unfair or dishonorable.

The rights which the positive law gives your client are founded upon that moral law which the government undertakes to enforce; the sort of practice by which you shall faithfully seek to secure to him the benefit of those rights is in part outlined by the government, but in great part rests upon your choice of means, some right and some wrong, and in this choice the unwritten moral law is involved.

The rights and obligations of your client under positive law in no wise rest in your discretion; your practice, except as the positive law has prescribed it, rests in your discretion and involves your choice of means and the manner in which you shall use your means.

Of course, so far as the law tells you what to do, you will do it. So far as it is within your discretion what to do and how to do it, you will recognize every rule of right and of right action, which the enlightened conscience should suggest and heed, and which a true sense of honor feels to be binding — not as a mandate from without, but as an imperative sentiment within. This moral law which should preside over your practice can only appeal to the moral sense of each individual. If the individual has none, the appeal will be in

vain. The most that can be done with him is to make him feel the force of the enlightened moral sense of those whose equals he is ambitious to be considered.

Every action which has a moral quality includes motive, act and end. I shall not pause to enlarge upon the general topic of ethics, but content myself with saying that the motive, the act, and the end should be right.

Do you say that the rule of practice thus broadly indicated is too ideal and exalted for practical use in this wicked world? I answer that it is in part because this is a wicked world, or rather because wickedness does greatly abound in it, that lawyers are necessary. Why are they licensed by the government? Not to promote wickedness, or to secure it immunity. Precisely the opposite. Their office is to advise and assist their clients in all things necessary and proper to enable them to have, maintain and enjoy those rights and privileges, to secure which the government under which we live was instituted among men. What would be thought of a government which should establish an order of learned experts to help any who should employ them for the purpose to deprive or defraud their fellow men of even their least share or lot in this equality, or of its fruits, namely, the property or property rights thereby justly obtained, and for such purpose to use any means not positively forbidden, or to pervert any permissible means? What would be thought of an order of men who would devote themselves, or to be known as experts in directing safe methods of successful fraud, or in keeping the fruits of fraud already committed? The native sentiment of right would not suffer the order to live.

Questions like these suggest their own answers. But such answers also answer many concrete questions.

Is it permissible to advise a client how to dispose of his property so as to cheat his creditors?

Is it permissible to advise a trustee or board of trustees how to manage or manipulate a trust so as to cheat the beneficiaries out of some part of it, or of its earnings?

To advise your clients to organize a corporation and exploit it so as to obtain real money for worthless shares?

To advise a client what steps to take to cover the fraud whereby he has acquired the property of another, or to destroy the evidence of it?

The answer to these questions and all others like them must be, No. It is plain that if you may so advise and act in one case, you may in all, and thus the profession in your hands might become the direct promoter of the objects and purposes it is instituted to avert or suppress. But suppose your client says, "Tell me the law, I am not inquiring about morals." I concede you may tell him the law. You cannot be the keeper of his conscience against his will, but you may not connive with him so to abuse the law as to achieve dishonest or dishonorable results. But you say this practically negatives the rule already stated. That depends upon the moral quality of the individual. I am not speaking to that moral defective who cannot understand; nor to him who seeks in the letter of the rule some shifty way to crush its spirit.

But you say that if there is any rule that is absolutely fundamental, it is that counsel must be entirely faithful to his client; that the law prohibits counsel from disclosing a communication made by his client to him as a client, or his advice thereon; that counsel is liable to his client for damages resulting from his negligence, or incompetency; and that he may be debarred by the court if by fraud or deceit he misleads him to his injury. All that is true, but it falls far short of authorizing or sanctioning any dishonest or unfair practice.

Let us try to distinguish between what you may do by way of attack, and what you may do by way of defense. In no case may you bolster up a bad case by luring your adversary upon the shoals and reefs; but suppose you believe your case a good one, and your adversary seeks to mislead and wreck you so that he can escape with safety, then you may treat him accordingly, and by such expedient means as the emergency affords and self-defense invites, you may, if you can, find your way out of the danger. If he shipwrecks there, retributive justice — and I think that is generally accepted —

seems to have been done. The case would seem to be within the spirit which has compelled equity to invent the rule of estoppel. But when you have circumvented his evil practices, you may not by falsehood or deceit build a false foundation for your own case.

I can conceive of cases in which by way of defending the right, the end will justify means which would never be permissible in defending or maintaining the wrong. In the case of defense you sometimes may pay the wrongdoer in his own coin — another term for retributive justice — but in asserting and establishing your own case you may never palm off false coin for true. Thus, I venture to advance the proposition for your further consideration, that you are never justified in deceiving your adversary in order to gain an unfair advantage over him, but only to prevent him from gaining an unfair one over you. I am willing to concede something to righteous indignation, to that provocation which invites retort in kind; to that generalship which outgenerals the trickster; but it is dangerous doctrine because so liable to excess; but I am here in the interest of your self-respect, and though you may not resist evil to the point of becoming an offender in turn, you do well if in laying your adversary by the heels you simply give an object lesson discouraging to vice.

Still we should remember that the rules and practices of legal warfare are not like the rules of military war — to subdue the enemy whether he is right or wrong; but are devised to aid in finding out whether he is wrong; because if so found, he is thereby subdued.

The general rule is, that it is never right to do wrong; and he is truly faithful to his client who so advises him; but in determining what is wrong, motive, means and end may sometimes be considered together, never forgetting, however, that the motive may be good and the end good, and the means so bad as to be wholly inadmissible, for example, to steal from your debtor the money he owes you, or to defraud anyone in order to found a charity.

But you say counsel must obey the instruction of his client. Yes, in everything except as to the manner in which counsel shall practice his art, and except instructions to do things dishonorable. Counsel may not make himself an accomplice in the further dishonorable practices proposed by his client in order to protect him from the consequences of the dishonorable acts he has already committed.

It is sometimes said that counsel may say and do for his client everything that his client could say and do for himself if he were sufficiently expert. Now, an unscrupulous client might lie to the court with a brazen face both as to the facts and the law, and resort to every means of deceit which trickery or chicane could devise. Of course, no honorable counsel can do these things, and hence it is not true that counsel in representing his client divests himself of himself and is merely the hand and voice of his client. What consideration would the court give to counsel or to the case of his client if he should open his case with words like these:

> "May it please the court — In presenting the case of my client I wish it to be understood that I am not responsible for anything I may say or do; that I merely undertake to present his case just as I believe he would present it himself, if he had sufficient professional expertness."

Such language would be regarded as an admission that counsel was ashamed both of his case and his client.

But it is plain that counsel may do and say for his client all that his client might honorably say and do for himself, and he ought to say and do it as efficiently as he can. If, as sometimes happens, the law has not been, so far as the peculiar facts of his case depend upon it, clearly declared, then counsel may contend for such declaration of it as shall protect his client; for in doubtful cases it may be that the court will declare it in his favor; but he must not mislead the court to believe that to be the law which he knows is not so.

And if it is a close question whether this or that line of authorities, or this or that principle of law governs the case, he may contend for whichever is most in his favor. Equally so when the evidence in the case is such that honest men, unaided by argument and suggestion, might hesitate or differ in opinion as to the proper inference to be drawn from it, he may to the best of his ability contend for his own side. In all these cases counsel for the other party will do the same, and, as it is sometimes expressed, out of the sparks of the conflict the truth will be revealed. Such contests honorably and skillfully conducted are aids to the administration of justice.

So, too, it is generally agreed that counsel may honorably defend any person charged with crime, however odious that crime may be, or however clear in advance of the trial his guilt may be supposed to be. Such a person has a legal right to counsel, and, in the judgment of our humane law, he is presumed to be innocent until his guilt is proved beyond all reasonable doubt. No man under our government can be convicted of crime except by due process of law, and the worst of criminals has a clear right to such protection. The rule is for the benefit of the innocent as well as the guilty, and if the guilty can be deprived of that protection, the innocent may be. You are the champion of the rights of all when in the person of the least deserving you insist in every honorable way that his measure of right shall not be scanted. But in this, as in every other professional action and relation, you are in no respect immune from any moral obligation to be honest and truthful.

Believe me, gentlemen, counsel do not and cannot divest themselves of the influence which learning, ability, integrity, character and standing give them. If this influence becomes great, it does so because always held true to its exalted source. And it is the pride of the profession, its ornament, and glory, and the vital principle of its perpetual life — if perpetual it

shall be — that the higher these qualities are, and the higher the standard by which they are tested, the greater, more useful, and honorable the profession will be, both in its body and in its individual members. This of itself ought to stimulate every generous mind to rise so near as may be to the highest standard. Who is it that will ask you to violate the best standard? Not the honest man certainly, who simply seeks to exercise his just rights and to have them determined and respected. Then it must be the dishonest man who will ask you to be the partaker in his dishonest practices, or to defend them by dishonest means. It will be your privilege to decline and to give him timely notice. No doubt he will employ less scrupulous counsel. Fortunate for you if you are so constituted that the consciousness of the unflecked whiteness of your soul is a greater source of comfort than a liberal fee could have been.

I may refer to the oft-quoted remarks of Lord Brougham as counsel upon the trial of Queen Caroline. He said:

> "That an advocate by the sacred duty which he owes his client, knows in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means, to protect that client, at all hazards and cost to all others, and, among others, to himself, is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other."

The Court of Appeals of this State (Great Western Turnpike Co. v. Loomis, 32 N. Y., 133) quoted these remarks of Lord Brougham, and added:

> "Such a proposition shocks the moral sense."

Thus we have high judicial authority as we also have the weight of carefully considered professional opinion in condemnation of this pernicious heresy. No doubt it has occasioned much evil.

The safety of the people and of the State depends in a great degree upon the righteous administration of justice. The first duty of the State is to make itself a guarantor of substantial justice to all its people. Failing that, it has no right to exist. The bar ministers at the altars of justice, and its service should be worthy of the office. But the judges who preside at the altar are recruited from the bar, and as is the bar so are the judges. Suppose the judge, through the lax or complaisant methods prevalent at the bar, has lapsed into a dull moral sense, or has never risen out of it. If counsel should seek to excuse or justify the wrong done by his client, by urging the irrelevant suggestion, that his client had done no worse than many others have done, and are doing — would not such a judge be inclined to accept it as a sufficient excuse? If so, justice would enter upon the down grade.

Suppose your case depends not merely upon a knowledge of the principles of equity as laid down in the books, but also upon a realizing sense of their proper force, and the judge — recruited from your bar but nominated by the political boss — is defective in the latter quality. You not only lose your case but assist in forming a precedent in which equity begins to drift from its moorings.

This is the more to be considered because in our courts of first instance cases are necessarily somewhat hastily decided, and in our intermediate appellate courts the right of appeal to the Court of Appeals lessens their sense of final responsibility. But the jurisdiction of the Court of Appeals does not except in capital cases extend to the review of questions of fact; in equity cases the discretion of the trial judge is often decisive, and his decision is such a mixture of law, fact, and his discretionary sense of what it is well enough to do, that no exception can avail to secure a review in the Court of Appeals. But the report of the case remains to exhibit the feeble power of equity under such a state of evidence.

I suggest these matters as incidental, but important sequences to lax professional ethics. If I am right they sap

the foundations. The dishonorable cannot well be kept out of the profession. Shysters by nature, and shysters developed under temptation, are with us always. The hand of greed stifles the remains of their conscience. But such men should be under the ban of the best opinion.

The bar should take care of its own reputation. It is fraternal and generous. It is inclined to leave every member to be the keeper of his own conscience. It is too tolerant of crookedness veneered with smartness. It has often been reproached with the generous fault of covering a brother's professional sins with its mantle of fraternal charity. When the bar was small it might well be that the fact that an erring brother should need and receive such a mantle was rebuke enough; but that day has gone by. Of course, I do not advise that the individual members should take upon themselves the invidious task of spying out the faults of their fellows; the practical remedy should be found through local bar associations.

The great increase in the membership of the bar, I think, imposes upon all its members a greater regard for its reputation. Why tolerate longer the old jokes at the expense of their integrity, such as imply approval of separating a client from his property?

In the palatial home of the Bar Association of the City of New York hangs a picture illustrating the old gibe about the lawyer keeping the oyster and giving each claimant a shell. I would consign the picture to the ash barrel. If it ever was typical of the truth it was so because it is true that the truth has its exceptions

It is bad form to slander ourselves even under the freedom of pleasantry.

The sense of honor differs with different individuals. If in every case of doubt or even of a difference of opinion among honorable men the rule should be that where the temptation to greed points one way, and the sentiment of honor, though less than unanimous among good men, points

the other, the doubt should be resolved against greed, our profession might attain to an exalted height, like a city set upon a hill. We may not hope to realize such an eminence in virtue, but may we not hope so to strive for it that we shall be ashamed of ourselves every time we fall below it, and rise again — seventy times seven if need be — with firmer resolution to be true to our ideals.

You are entering upon your career, young gentlemen, when greed is the most potent factor of activity, and its unequal fruits the most dangerous element of discontent.

You see articles in the public press as to the causes of corporate dishonesty. As if such an evil were as incontestible as the ebb and flow of the tides, and its causes as proper a subject of scientific investigation. You see specific charges of dishonest gains upon a vast scale and through varied forms of deceit.

This is a country of universal suffrage, and an ominous note of warning is sounding, not obscurely. It is that the vast wealth of the manipulators of money is becoming so obnoxious to the discontented as to be evidence of its dishonest acquisition, and also to invite reprisals. The charge of fraud, corruption and graft is easily made, hard to be proved, and often harder to be defended, but it may in evil times without much proof serve as the pretext for the strong hand — for violence and spoliation.

It is to be hoped that through publicity and discussion the public agitation will result in more clearly condemning the trickery, chicane and oppression which are too often resorted to to acquire wealth. Already there are hopeful signs that wealth thus acquired withdraws from the possessor the respect of men whose good opinion is valued. "Better," says Solomon, "is a little with righteousness, than great revenues without right. A good name is rather to be chosen than great riches." Suppose it to be true that poverty or envy forces the masses of the people to recur to these consolatory proverbs, still their truth cannot be disputed, and the revival

of their influence may avert the storm, or calm it after its first rage is spent.

History tells us that a decaying State and a corrupt bar nurture each other in evil. In this age an enlightened bar through its wholesome influence with the courts and clients can do more, perhaps, than any other order of men to stay strife and strengthen the bulwarks of justice and peace.

Time was when the decay of morals on the part of those who enjoyed power, privilege and wealth forboded the downfall or disruption of the State. But there was then no such general diffusion of intelligence as now, no universal suffrage as now. A disinterested public opinion is usually right, and it never was more potent than now. Convulsions, agitations, outbreaks and disturbances, founded upon alleged abuses, may, among intelligent self-governing English-speaking peoples, be the spur to remedial agencies, promotive of better civilization. They may for a short time unchain the passions of the mob, but the strong arm of the State will prevail, and the sober intelligence of the people, when they recover from the shock, will reform the abuses. If the storm breaks, it will pass. It may leave some wrecks, but it will bring its compensation in its lessons of wisdom and thus the dawn of a brighter day.

It is lamentable that such remedies should be necessary. I think the profession could avert them if it would.

I sometimes think that our methods of administering justice — I mean the procedure — the mint, anise and cumin — not the weightier matters of the law — are unworthy an intelligent and justice-loving people. The lawyers are largely responsible for it. We inherited something like these methods from England, and have manipulated our inheritance — sometimes for sinister purposes — into a sort of maze, so beset with perplexing details that the honest suitor seeking the straight road to speedy justice finds himself mired in its by-paths.

This particular evil the lawyers should seek to remedy. If their ethical sense could be roused from its passive to an

active condition and focused upon reform, reform would follow.

Another evil, I think, is in our system of evidence. It has come down to us from an age when less injustice was to be feared from ignorant juries than from judges dependent upon the pleasure of the crown. It is based upon the correct principle that inexpert jurors should not be misled by irrelevant facts. But the courts have wandered step by step far afield in distinguishing with subtle refinement between competent and incompetent evidence of relevant facts. If juries were abolished, the reason for these refined distinctions would cease. The result now is that the dexterous counsel, unable to prevail upon the merits, often succeeds in reversing a righteous judgment, upon such alleged errors in evidence, and too often delays the execution of such a judgment in his vain efforts to reverse it. I am not arraigning juries, but the system by which justice is delayed and thus often denied and often perverted. Better abolish it than consider so late and so long whether a technical error may not be detected in the ruling which did or did not permit the jury to hear something which might or might not be safe to address to the ear of ignorance. Better no new trial than one too late.

I instance these cases as examples illustrative of the tendency of our system to beclog itself with obstacles and pitfalls. I see no peaceful corrective of such evils except as inspired by the profession. No other body of men is so competent. Justice is the end, and upon your active ethical sense of the proper means to that end must rest the hope for its speedy, wise and peaceful attainment.

If I have omitted to hold up to your admiration and emulation the noble and useful careers of some of the many illustrious members of the bar who in the forum, in the councils of State, and in the seats of justice, have exalted our conceptions of the worthiness of human nature, and of the splendor of intellectual and moral achievements, it is not because I fail in appreciation, or reverence, or gratitude. Such

lawyers are among the glories of the human race, and have been the saving leaven of our profession through all the ages.

In no other age has the bar been more learned or able than it is to-day. It is still advancing in learning and ability. The number of those with whom the sense of honor will preserve their honor from all stain is not diminishing. The temptations, however, that beset the bar were never greater, and the need to preserve the standard of professional ethics as near as may be to its ideal purity was never greater. If I recall some possible lapses, it is to encourage you to shun every unworthy practice, and to aid as best you can in the righteous observance and administration of justice.

The Obligations of the Lawyer

LECTURE

DELIVERED BEFORE THE STUDENTS OF THE ALBANY LAW SCHOOL

IN THE HUBBARD COURSE ON

LEGAL ETHICS

By

Henry W. Jessup, A. M., LL. M.

LEGAL ETHICS.

A Lecture Before the Students of the Law Department of Union University in the Course Founded by General Thomas H. Hubbard.

THE OBLIGATIONS OF THE LAWYER, BY HENRY W. JESSUP, A. M., LL. M.

To the Students of Albany Law School:

A lawyer is an officer of the courts bound by an oath, emphasizing his relations, to the community, in that he swears to support the Federal and State Constitutions; to the courts of record of the State in which he becomes an important agent; and to his clients, in that he assumes the duties of attorney and of counsellor at once.

To consider these logically we may reverse their order, for the lawyer's relations to the community, as well as to his fellow lawyers, grow out of his relations to his client and to the court. Some one might frivolously assert that in considering a lawyer's relation to his client one must follow the rule laid down in the recipe for hare soup, *i. e.*, "first catch your hare." Whereas, as a fact, the duty and obligation are as far antecedent to that delightful moment as is the workmanlike completion of the foundation to the elaborate and costly superstructure that owes to that foundation its stability and strength. The foundation is lost to sight, but never loses its essential value. You are now laying foundations, broad and deep. If they be adequate, and honestly laid, you need not worry about results. You must know the law; you must know where it is to be found; and you must be convinced that, barring some lamentable statutory expressions of the public will, the law is common sense.

The profession of the law is, we are told, at times, in danger of being commercialized, of being looked upon as a mere business. Such men as James C. Carter and Adlai Stevenson have, in commenting on the lessening influence of the lawyer in public life, attributed it to the increasing disposition of able men to place themselves exclusively at the disposal of great industrial enterprises. But, even if this be true, it is only the more imperative that emphasis be, from time to time, laid upon the dignity of the office, without rehearsing the great public services rendered in our own country as well as in the mother country by men learned in the law, entirely outside of the lines of professional duty.

As Lord Bacon has told us, "Every man owes a debt to his profession;" the lawyer is peculiarly under the force of the adage *noblesse oblige;* and so we, having entered into what Dr. Warren calls "a solemn contract with society at large" [Dr. Emory Washburn's lecture on the Study and Practice of the Law, and the address of the late Samuel Warren before the Incorporated Law Society of the United Kingdom in 1887 are well worth reading], and engaged under solemn oath to protect right and redress wrongs, may, not untimely, turn aside, once in a while, from the abstract study of the law, to consider what our relations are to that society as a whole and to members of it in particular. I shall, therefore, consider, first, the relation of the attorney to his client.

I. The Lawyer's Relations to the Client.

We have, perhaps wisely, abolished the distinction between solicitors, or attorneys, and barristers, in our practice and in assuming the title "attorney and counsellor-at-law" we fall heir to all the dignities and honors implied in either title on the other side of the Atlantic. We are members of a learned profession and our education therein is never done. By admission to the bar, we do not cease to be students, but as Dr. Washburn says, we become our own teachers. The word "attorney" is an honorable old English word, and the same plea might be made in behalf of its use here as was made by

Dr. Warren in his defense of the term as contrasted with "solicitors," which in his day there was a tendency to prefer by those who had the right to both titles. Nevertheless, the term has not been free from reproach because of the ignorant or knavish actions of many lawyers who have used this high office in order to overreach others, or who, from their zealousness to enforce the letter of the law, have cast discredit upon the law itself and the profession to which they belong.

It is a familiar thing, in our day, about the time of law-school commencements, to hear of the number of additional lawyers "set loose to prey upon the community," and similar reflections upon the integrity of the profession date back to the very earliest times. So we find in the Year Book of Edward III., that certain attorneys, being about to go on circuit, "taking water upon the Severn," their boat was cast away in a storm on the Cumberland coast, and there they were seized as foreign spies, and, before they could secure their liberty, default has been entered in a case in which one of them had appeared. Upon his application to open his default and his setting forth the facts above detailed, the following note is given as having been made by Scarshulls, J.: "It was foolish for the attorney to go on the water and trust to God's taking care of him; wherefore," the note continues, "he said deliberately that that did not excuse him." With such a judicial reflection on the tenuousness of a lawyer's claim to Divine protection, it is not strange that the lay and the poetic mind should have indulged *ad nauseam,* in sneers and sarcasms directed at the profession generally.

In Earle's Microcosmography he finds the attorney "all for money." Overbury describes the pettifogger as promoting quarrels, "and in a long vacation his sport is to go afishing with the penal statutes. He is a vestryman in his parish and easily sets his neighbors at variance with the vicar, when his wicked counsel on both sides is like weapons put into men's hand by a fencer, by which they get blows, he money. *Per contra,* it was, I read, but an anonymous writer who gave this

tribute, 'an honest lawyer is the best life guard of our fortune, the best collateral security for an estate, a trusty pilot to steer one through the dangerous, and oftentimes inevitable, ocean of contention; a true priest of justice.'"

In 1887, in a paper before the Incorporated Law Society of London, Mr. Warren suggested that a history of solicitors should be prepared, and that it would be interesting to include therein, a collection of satires, poems and caricatures relating to attorneys and their ways.

We jest perhaps unwisely on such topics. But, practically, we do not now endeavor to limit the number of attorneys, viewing them as a dangerous class. But our better policy is to regulate the number of attorneys by increasing the tests of capacity imposed by way of entrance examinations, and we leave to the law of supply and demand the regulation of membership at our Bar, so that we have in Greater New York, almost as many lawyers in practice as were enrolled in the whole United Kingdom in 1848. As far back as 1455, says Mr. Christian in his "History of Solicitors," the Commons petitioned for a statute regulating the number of common attorneys in courts of record in the counties of Norfolk and Suffolk, and in the city of Norwich. The king granted the petition "*if* it be thought to the judges reasonable."

It is suggested by Professor Maitland, in his "Social England," that the right to appear by attorney sprang at first from the king; that the king, of course, must appear by others in his courts, and that this right could be conferred upon his subjects, at first as an exceptional favor and afterwards as a general rule, and the learned writer suggests that to the ancient law it did not seem fair that one should put an expert in his place to represent him, remarking, "My adversary has, as it were, a vested interest in my ignorance or stupidity."

However, our profession needs no vindication to-day. And it is no recent statement, and true now as it was when made, that the manners of the bar "have in every age been such as were the first improved, and the last corrupted."

Considering the attorney as a member of a noble and historical profession, bound by many honorable traditions; sworn as an officer of the court to fidelity in the discharge of his duties, and assuming him to have entered upon the contract relations involved in his retainer to advise a client, or to prosecute his rights, or to defend them against some invasion by another, we are to consider what these relations may involve.

The relation of attorney and client is not only a fiduciary relation, but should be one of friendship. The attorney makes many a sacrifice for his client of which the latter never dreams. The remarkably small number of cases in the enormous number of reports which involve disputes between lawyers and clients testifies to the general character of the profession and the remarkable extent, as compared with other occupations in life, to which the attorney faithfully discharges his side of this contract obligation. He devotes all his abilities to his client's case. He throws his influence, personally and professionally, in the scale when negotiations are pending; he endorses his client's character by his own reputation; he stands in his place before the court and pleads his cause; he asserts a right, which he has agreed to defend, in the face of a sometimes impatient and angry bench. He spends his days and nights in planning for and safeguarding the interest committed to him; his recreation time is given up without a murmur to please some cantankerous or exacting client who never thinks of making up to him in any way for clearly extra service. He is patient and courteous to the cranky client who waits upon him at his office day after day and month after month, telling him the same story over and over again for fear his rights may not be adequately remembered or protected.

Perhaps he assumes the care of feminine interests and imperils his reputation for professional probity by transactions with women clients who know only credits and abhor debits; and are always anxious to draw, but never to settle; whose memories, perennially refreshed by talking it over with their

friends, are poured into his unwilling ears until reason almost totters on its throne. Never invest for a woman client — send her to a reputable broker.

On the other hand, how delightful are the usual occupations of the profession and how few of us would, if put to the touch, exchange them for any other! How interesting the analysis of facts and the application to them of principles of law; which of us has not had his case (to him of first impressions), and after patient study developed a theory under which he knows that relief can be ultimately secured; what more fascinating occupation than to reduce wrangling contentions or negotiations of busy minds to a concise, distinct and intelligible contract or other instrument. How exciting is the quick effort under pressure to determine a question accurately and satisfactorily when a time limit is set by necessity or by the impatience of a client. How engrossingly delightful is the chess game of actual trial or the fencing match of counsel's arguments; how pleasant is the sense of power to grasp details and reduce them to an orderly consistent sequence which comes with experience, and which in time gives to consultation an element of real pleasure. The beauty of these professional delights is that they can be felt in a lesser degree, but still to some extent by every lawyer from the time of his first experience. They come to him in varying forms and in increasing degree as the years go on.

But the condition precedent to the enjoyment of all these pleasures by the lawyer is the possession of a client. He, therefore, who does anything to disturb the friendly and intimate relations existing between himself and his client, whether it be caused by impatience of temperament or dishonesty of character, is false to the duties laid upon him. The client, brethren of the bar, is not only the source of your professional income, but is the very foundation of your professional happiness

The lawyer should look upon the relation of attorney and client as something expected to have the gift of continuance, to be cultivated as friendships should be, at least for two lives

in being, and not as a mere cow, to be milked as by a tramp, in passing. The writer had an experience some years ago, which he forwarded to the "Albany Law Journal," which he may be pardoned for quoting:

> One who had at one time occupied a chair in one of our law schools met some years later one of his former pupils. He inquired of him how he was getting along, to which the young man rejoined:
>
> "I ain't complainin', I'm catchin' suckers."
>
> He then proceeded to dilate upon a fee of $1,500 which he had recently realized through the organization of a small corporation. The ex-professor commented on the disproportion of the fee to the services rendered, and offered the fatherly advice that he could hardly expect to retain the business of a corporation so substantially milked at the outset.
>
> The answer was prompt:
>
> "I don't expect to get any more business from them, professor; I does mostly a transient business."

As long as you practice law you will find the preliminary retainer and the contingent fee the Scylla and Charybdis between which it is hard to steer your professional bark. I have no hesitation in asserting that the contingent fee is chiefly reprehensible, not to the public, but to the profession. Disregarding the "ambulance-chaser," and the man who is all but guilty of champerty in soliciting litigation and promoting it and persuades the client to litigate by telling the client that it will cost him nothing unless he is successful, it is manifest that the ordinary decent practitioner can only view the contingent fee with dislike. A contingent fee is a promised compensation for services to be rendered payable out of a recovery and only in case of recovery, therefore the attorney has to devote himself to the work committed to him without retainer or "refresher" during the trial, appeal, possible new trial and further appeals. It may be a matter of two, three or four years before he can have the handling of his compensation,

and should the case fail, because of his client's inability to bring forward adequate testimony or because his story may break down on cross-examination, he has had his labor for his pains.

Still eliminating the dishonest practitioner, who solicits this kind of business, it is a suspicious circumstance, from the lawyer's point of view, when the client asks that he take a case upon a contingent fee. There is always a possibility that there is some doubt on the client's part as to the justice of his case. Where it has its origin in the *stinginess* of his client, it is almost equally disadvantageous to make such an agreement. But where it has its origin in the *poverty* of the client, the whole view of the situation is changed, and it may then be the duty of the attorney to take the case and to contract with the client for taking a fee contingent upon success, with all the possibilities of never being paid for the services to be rendered, from a sense of conscientious discharge of professional duty to the community.

Lawyers of the highest standing make agreements of this character. In a very famous negligence case (Laidlaw v. Sage, 158 N. Y., 73, etc.), the plaintiff was represented by a firm headed by a former presiding justice of the Supreme Court, and the most distinguished trial lawyer of the day was retained as counsel. It arose out of a peculiar explosion in a down-town building in which the plaintiff claimed he had, while in ignorance of the threatened danger, been dragged in front of the person threatened, with the result that he was removed from a place of comparative safety to a place of danger and was severely injured, and that his body being used as a shield, saved the life of the one by whom he had been seized. This case was tried before a jury four times resulting in a dismissal of the case on the first trial, a reversal on appeal by the Appellate Division, a second trial with a substantial verdict, a second appeal and a new trial ordered for erroneous charge to the jury, a third trial with a disagreement, a fourth

trial resulting in a still larger verdict and an affirmance by the Appellate Division, and finally a new trial ordered by the Court of Appeals.

The plaintiff was poor and without means, wrecked in health, and those attorneys, whose professional ethics were of the highest character, made an agreement in writing for fifty per cent. of the recovery, and in the end got nothing.

A year or so ago I sent to the New York Law Journal a copy of an agreement made by Daniel Webster to argue the Girard will case in the Supreme Court of the United States on a contingent fee.

Many accident cases where poor people are mown down by rapid transit facilities in our crowded cities are without relief in the absence of the contingent fee.

It is for the good sense of the profession, safe-guarded by wise judicial interpretation of such agreements *in the light of all the facts in each case,* to determine what percentage shall be specified as compensation in any particular case, and it makes a clear demand upon the honor of the lawyer, to whom the testimony is presented, and by whom a very fair estimate of the chances of success can be made, to fix the amount for which he is willing to undertake a litigation, and when he has stated the rate of compensation he will require and the client executes an agreement for that per cent., *the agreement ought to be strictly enforced* in the absence of fraud and over-reaching. It is wholly unreasonable to say that a fifty per cent. agreement is unconscionable on its face, as has been done in several recent cases in State and Federal courts. It cannot be said, moreover, that the amount of the percentage necessarily depends upon the amount in controversy. In an accident case, the plaintiff may want to sue for $25,000 when the attorney knows that it will be difficult to get a verdict for $2,500. The amount in controversy in such cases is based on *the amount of the verdict when collected,* and if the agreement is made solely with reference to the amount demanded, it will prove meagre indeed when computed upon the basis of the

amount recovered. Nor is it fair, in the absence of peculiar conditions, to apply the test of a *quantum meruit* to a written agreement for a fixed percentage; unless there be fraud in the inception of the agreement, the client should be held to pay that which he has agreed to pay with his eyes open.

The writer does not wish to be understood to be an advocate for the contingent fee. Personally he cannot too strongly deprecate the practice. It is not productive of anything but trouble and dispute. The laborer is worthy of his hire and a moderate retainer and reasonable refreshers from time to time cement the relation of the attorney and client, preventing misunderstanding and often facilitating settlement of a case when the client realizes the costliness of litigation.

But as an officer of the court the attorney is now, by statute, protected in respect to his compensation, and it is profitable to get a clear idea of the statutes thereby created.

In Fisher-Hansen v. Brooklyn Heights R. R. Co. (173 N. Y., 492), Vann, J., observes, reviewing the subject:

> "The law has made great progress in protecting members of the bar since Blackstone wrote that 'a counsel can maintain no action for his fees, which are given not as *locatio vel conductio,* but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without doing wrong to his reputation.' (Chase's Blackstone [3d ed.], 630.) It seems strange to the lawyer of this generation to read the report of a case decided as recently as 1841, in which those eminent lawyers, Samuel Stevens and Peter Cagger, as co-partners, had sued their client to recover the sum of $300 for arguing two cases in the Court of Errors. (Stevens v. Adams, 23 Wend., 57; affirmed *sub nom.* Adams v. Stevens, 26 Wend., 451.) It was gravely argued for the defendant 'that, at common law, a counselor cannot maintain an action for his fees;' that 'such is undeniably the law of England, and in this State it has not been held otherwise, the question never having been directly brought up for adjudication.'

"It was held, however, without dissenting vote either in the Supreme Court or the Court of Errors, that the action would lie, although there was no reported precedent in this State to justify it. Chancellor Walworth, writing for the Court of Errors, declared that he had no doubt 'that, by the law of this State, as it has always existed from the time of its first settlement, the lawyer, as well as the physician, was entitled to recover a compensation for his services; and that such services were never considered here as gratuitous and honorary merely.' Judge Cowen, for the Supreme Court, said that, as he understood, 'there has been a case, perhaps several cases, in this court wherein counsel have been allowed to recover of the clients argument fees on a *quantum meruit.*'"

Thus, within the memory of lawyers now living, the right of counsel to recover compensation from their clients, outside of the fee bill, was challenged at the bar, and elaborately discussed by the bench, three opinions having been written in the court of last resort to show that the right existed. There has been a marked advance since then, mainly through the legislature, which has been generous to members of the legal profession, not only in costs and allowances, but also in providing a lien upon the subject of the action to secure their compensation.

When the Code of Procedure was enacted in 1848, the fee bill was abolished, all restrictions upon "the right of a party to agree with an attorney, solicitor or counsel, for his compensation" were repealed, and the measure of such compensation was thereafter "left to the agreement, express or implied, of the parties." (Laws 1848, chap. 379, sec. 258.)

In 1876, when the first part of the Code of Civil Procedure was passed, the only regulation upon the subject was the following:

"The compensation of an attorney or counsellor for his services, is governed by agreement, express or implied, which is not restrained by law." (Laws 1876, chap. 448, sec. 66.)

While this statute was in force a case arose wherein the plaintiff sued a railroad company for damages owing to personal injuries caused by its negligence. He made a written agreement with his attorney to give him one-half of the recovery for prosecuting the action and paying the expenses. After the commencement of the action the defendant, with notice of the facts, settled with the plaintiff by paying him $1,000, and it was held by the Court of Appeals that, as the cause of action was not in its nature assignable, the party could not by any agreement before verdict or judgment give his attorney an interest therein, and that the settlement was a bar to the action, notwithsanding the agreement that the attorney was to receive a share of the recovery. (Coughlin v. N. Y. C. & H. R. R. R. Co., 71 N. Y., 443.)

After this decision, and doubtless owing to it, said section was amended by adding at the end thereof the following:

> "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment." (Laws 1879, chap. 542, page 617, sec. 66.)

In 1899, the section was further amended by making it apply to a special proceeding, extending the lien to a claim as well as a cause of action and a counterclaim, and providing a remedy to determine and enforce the lien upon the petition of either attorney or client, so that the section in its present form is as follows:

> "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the services of an answer containing a counterclaim, the attorney who

appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court, upon the petition of the client or attorney, may determine and enforce the lien." (Laws 1899, chap. 61, page 80, sec. 1; Code Civ. Pro., sec. 66.)

Thus, we have a statute gradually progressing in one direction, which has required more than half a century for its development. It consists of only three sentences, but each has been the subject of one or more independent enactments intended to protect attorneys and enable them to collect pay for their services. The first establishes freedom of contract between attorney and client with reference to the compensation of the former. The second and most important gives the attorney a lien upon his client's claim and cause of action, and when the cause of action is merged in a verdict, report, decision or judgment, the lien attaches to that also as well as to the proceeds thereof, so that it cannot be affected by a settlement made between the parties at any stage of the action. The third provides a new remedy: In a course of these lectures before the Dwight Alumni Association of New York, I was able to discuss in detail illustrative cases under these various heads; but we cannot do more in this short hour than to summarize the matter concisely, by typical instances:

Case A. Insolvent Client.— Settlement behind attorney's back, *e. g.*, as by satisfaction of judgment secured. Lawyer protected by lien under section 66. Lien is notice to adversary. Court will entertain application to vacate satisfaction, and will issue execution in aid and to extent of the lien. (As in Peri v. New York Central, 152 N. Y., 521.)

Case B. Attorney Receives Proceeds of Litigation.— Dispute with client as to amount of fees. Client has a summary

remedy under section 66. On his petition that the attorney pay over, the court will ascertain and determine the amount respondent is entitled to retain.

It must be remembered that the courts insist on the client's unimpaired right to agree to settle his cause of action, and that it insists equally on the attorney's sustaining the burden of showing his good faith and honesty in his agreement or dealings with his client; but not because it entertains any antecedent presumption of its officers' dishonesty of act or purpose, but simply because it is zealous of his reputation, and confident of the honest practitioner's ability to sustain such a burden.

In passing, we must note that the ethics of the profession forbid the soliciting of business or the promotion of litigation. Some practitioners of standing sail pretty close to the wind, while avoiding the charge of ambulance chasing. Recurring to our figure of "hare soup," the attorney is actually prohibited from first catching his hare. And as you sit in your humble office listening to those disappointing footsteps in the hall that always seem to stop just short of your door, or after an exhilarating moment, to pass on to the door beyond your own, you are left to think in your discouragement that your profession is to be likened to that of a spider, who having spread his web must wait for his prey to be entangled therein.

This is a character problem, and the answer to it is obvious. The ethical difficulty is presented in the temptation to induce business by promises of compensation. We comment briefly, therefore, as to champerty and maintenance. Maintenance is the larger term and implies officious intermeddling in the litigious affairs of another assisting in the prosecution or defense. The assistance may be with money or otherwise. The offense originally was against the common-law rule that rights of action were not transferable and was directed against the custom of transferring these rights to influential persons to obtain their support and favor, and as the rule as to the assignability of causes of action has been greatly relaxed, so has the doctrine been much mitigated.

Champerty is a species of maintenance. The name is derived from *campum partire,* which means to divide the subject matter of the suit involved, and originally involved an agreement by the party officiously intermeddling to carry on the litigation at his own expense. This rule to carry it on at one's own expense is not insisted upon as an essential condition in all the states. There can be maintenance without champerty, but there can not be champerty without maintenance.

The New York statute against champerty and maintenance is penal. Section 7 of the Penal Code makes it a misdemeanor to violate either of the two preceding sections. It is, therefore, essential to note further that the offense rests in intention, and it is, therefore, submitted that the burden of proving the officious or intermeddling intent rests upon the one alleging it.

The lengths to which the courts have gone in mitigating the rule, in view of the disappearance of the original reason for the rule, can be found in decisions that any interest whatever in the subject matter is sufficient to exempt one giving aid in the litigation from the charge of illegal maintenance. So that contingent, reversionary, equitable or common interests entitle one to assist in a litigation; those related by kindred or affinity or marriage; those who have some privity of estate, as landlord and tenant, or mortgagee or vendor under warrant may encourage the litigant without violating the statute.

It may be noted, of course, that the element of maintenance is entirely eliminated when an attorney takes for his fee an interest in a cause of action reduced to judgment, and even where contracts have been held champertous, except in flagrant cases, the courts have constantly upheld the attorney's right at least to a *quantum meruit* for the services rendered. As to champerty, in the Fitzsimons case (174 N. Y., 15), an attorney, acting in utter good faith, was adjudged to be guilty of champerty, which is a misdemeanor; and had the Court of Appeals held that the order was not appealable, his reputation and business might have been ruined. I suppose there are few of us who have not taken cases without any definite understanding as to disbursements, and have actually made disbursements in the

case, and sometimes upon rendering a quarterly statement thereof to our clients have not been reimbursed. This, of course, is not champerty — but go a step further; there are some offices which with well-known clients may say, that they will render him a statement later of the expenses of the litigation, which they will defray from their office account as they arise. This, certainly, is not champerty, although the result may be that the attorney is actually carrying the expenses of the litigation. The statute in the premises is contained in section 74 of the Penal Code, which is as follows:

> "An attorney or counsellor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, *as an inducement* to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, *for the purpose* of bringing an action thereon. But this action does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received."

The intent of this statute is clear. There must be a solicitation by the attorney of the business and an agreement to give something or cause something to be given in consideration of getting it, and this statute must be reasonably construed.

In Fowler v. Callan (102 N. Y., 395, 398), the attorney, retained to recover a devisee's interest in an estate, took a deed, by way of compensation, of *one-half* the property to which the client believed himself to be entitled. It did not appear in that case whether he was in possession or not. The attorney, on his part, covenanted "to conduct the defense to a close, *paying all costs and expenses of the litigation,* and indemnifying the devisee against all such liability." Yet the Court of Appeals, then consisting of Ruger, Ch. J., Andrews, Rapallo, Miller, Earl, Danforth and Finch, JJ., concurred in holding the agreement "one solely for compensation, contingent, to be sure, and contemplating success."

In the Fitzsimons case (*supra*), the Appellate Division has held that a part of the consideration for the fifty per cent. agreement covering his fees, was a promise by the attorney to pay out of his own compensation whatever was due or should become due to the former attorney for legal services, and discharging the client from all liability to such former attorney. The court then goes on to say, "although there is no express language in the agreement by which the attorney is to pay the costs and disbursements that might be incurred in the litigation, it is significant that *the agreement did not expressly impose* that obligation *on the client.*" If the agreement was silent on this point, it is submitted that it left the obligation for costs and disbursements just where the law lays it, on the client. The court cited Badger v. Celler (41 App. Div., 603), where it had observed that an agreement by the attorney to pay disbursements would have been void if made; that the client would in any event be responsible for such disbursements to the attorney. However, the Court of Appeals cited and followed the case of Fowler v. Callan (above), in which case the attorney had agreed to indemnify the client against all expenses of the litigation. Badger v. Celler is interesting for the side light it throws on contingent fees, because there the fee was contingent *upon success,* and the agreement provided that *if the attorney failed to collect,* he was to *receive nothing,* and he died before recovery in the suit, and his estate sued on a *quantum meruit. Held,* that in the absence of proof of such a recovery, the attorney's estate was not entitled to any compensation for the services rendered. "A word to the wise is sufficient." That is, the contingent agreement may amount to an assignment of an interest, as in Bennett v. Donovan (83 App. Div., 95), or it may entitle the attorney to nothing except out of the actual proceeds, or it may be so loosely drawn as to be set aside altogether.

Sections 73 and 74 of the Penal Code relating to Champerty, viz., the purchasing of claims for the purpose of suing thereon or to promising a consideration for the purpose of having a matter placed in one's hands, were carefully passed upon in

Fowler v. Callan (*supra*). The court held that sections 73 and 74 forbid: "*First,* the purchase of the obligations named by an attorney, for the purpose and with the intent of bringing a suit thereon; and, *second,* any loan or advance or agreement to loan or advance as an *inducement* to the placing, or in consideration of having placed in the hands of such attorney, any demand for collection." The statute, says Judge Finch, "contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney, or in which the latter by *officious interference* procures the suit to be brought and obtains a retainer in it."

In the matter of disbarment the history of the power of the courts over attorneys is very interestingly set out in the argument of Theodore W. Dwight before the Court of Appeals, reported in Matter of Cooper (22 N. Y., 67), which is well worth reading. The right of the Supreme Court, through its Appellate Division, to control members of the bar after admission, is now a matter of statute, and is contained in section 67 of the Code of Civil Procedure, which reads as follows:

> "An attorney and counsellor, who is guilty of any deceit, malpractice, crime or misdemeanor, or who is guilty of any fraud or deceit in proceedings by which he was admitted to practice as an attorney and counsellor of the courts of record of this State, may be suspended from practice, or removed from office by the Appellate Division of the Supreme Court. Any person, being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such. Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the Appellate Division of the Supreme Court a certified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys. Upon a reversal of such conviction, or pardon by the president of

the United States or governor of this State, the Appellate Division shall have power to vacate or modify such order or debarment."

This section is the present amended and elaborated form of 1 Revised Statutes, 109, section 24. The practice is to present affidavits or other papers containing the charge to be investigated to the court, which will, if the charges are sufficient, proceed of its own motion. (Matter of Brewster, 12 Hun, 109.) For it is the duty of the court to cause such charges to be preferred if it is satisfied from the papers presented or from what takes place in its presence, that the ends of justice so require. If the court is so satisfied it will make an order to show cause, either of its own motion or on the papers presented to it, which must be served upon the attorney personally. The papers alluded to are not evidence. They merely serve the purpose of pleadings. On the trial the ordinary rules of evidence must be observed. It was held in Matter of an Attorney (1 Hun, 321), that as the proceeding is penal, the charges must be sustained free of serious doubt. In Matter of Randal (158 N. Y., 216), the attorney under charges refused to testify, and the court, affirming 34 App. Div., 631, held that the proceeding was not criminal, and, therefore, the statutory rule that there was no presumption from his refusal did not apply, and that as to matter as to which he must have had personal knowledge and failed to contradict, there was a legal presumption that they were true. It will be noted that the court has power either to suspend for a period of months or years or to disbar entirely.

The right given by section 67 to reinstate an attorney who has been pardoned, does not compel the court to reinstate him, for it is manifest that while ordinary reputation and *pro forma* letters from persons in good standing are sufficient evidence of good moral character for the purpose of primary admission, the fact that an officer of the court, presumed to know the law, has committed the crime and been guilty of serious breach of trust, compels the court to be more careful in once more endorsing him to invite the confidence of the public.

It is manifest that the lawyer's relations to the community grow out of his relations to his client and to the court. They involve also his relations to his fellow lawyers. The obligations he is under to society at large by reason of his oath, put him within the category of those to "whom much has been given and of whom, therefore, much will be required." It seems elementary that the lawyer should stand always for obedience to law, respect to the Constitution, and vindication of the rights of man. Yet recently a case was reported of a lawyer who was stricken from the rolls because he had taken part in a lynching. What a pitiable spectacle!

The lawyers differs from other citizens only in the degree of conscientious observance of the law which is expected from him. Every one is presumed to know the law. Fortunately for the profession, this is not true in fact of every man; *un*-fortunately for the profession, it is also not true of every lawyer. But he should, at least, have a wholesome respect for the law, for in spite of the refinements, distinctions, modifications and disagreements recorded in our reports, there are great golden threads of principle running through the texture of statute-made and judge-made law easily discernible by the trained eye. These mark the costliness and value of the fabric which has taken so long to weave. Now if there come to your knowledge cases of willful refusal to discern, to recognize or to properly value these principles on the part of some fellow member of the bar, what are we to do?

Every lawyer is interested in every other lawyer's relations to the community. If, to his knowledge, his competitor is dishonest, shall he good naturedly and contemptuously let the matter pass; or shall he, jealous of the honor of his profession, assume the burden of purging the bar of its unworthy member? And if he determine to do the latter, shall he apply to a bar association or immediately to the Appellate Division? And is it worth while to incur the odium and expense of what is sure to be considered by many a persecution? Few of us have the courage to face certain misunderstanding.

It seems that the matter of disbarment ought to be the peculiar province of the local bar association through its committee on grievances and special counsel. It ought not to be astute to impute dishonesty or to charge improper practice on the complaint of any attorney still smarting under a sense of outrage. But it can sift the matter more at leisure, and it ought to take up every case, regardless of the magnitude of the offense, or the offender's membership in its body. Prevention and cure have the same ratio here as elsewhere. Activity for one year in purging work would accomplish wonders.

In one sense this is the highest service our bar associations can render. Put in the knife — the surgical operation is the safeguard of the life of the profession. And do not worry too much about the use of the anaesthetic "private hearings." Publicity is the most deterrent element. Be sure you are right, of course — but then go ahead.

The addresses before our city, State and national bar associations, always printed, adequately cover the field in regard to the great service the bar renders collectively to the community in influencing and shaping legislation.

Individually many lawyers, busy, driven or plodding at their professional work, find or make time to contribute for the general information of the community, the result of their investigations or meditations on some particular point of public interest. Such papers or addresses are always of value, for if they propose a solution or remedy for some abuse or defect, and it be the correct one, they have done a great service; if it be an incorrect one, its publication is sure to arouse comment, provoke answer and discussion, and thus elicit the right solution or remedy.

Much need not be said of the lawyer's duty as a citizen. It is his duty as a man first of all. Perhaps it is more attractive to him because he is a lawyer. Certainly if he is well informed and trained he can be of invaluable service. But let him not enter politics as a lawyer, but as a man, that is, let him not accept the first political retainer — and take a side *because it*

pays — let him form and then hold convictions and keep in the back ground hopes of any reward — only thus can he maintain his self-respect and expect permanent political influence.

If we but had a real diplomatic service, as does Great Britain, so that men, trained in constitutional law and history, entering at the bottom, could work up through consulate to attaché, and thence to a ministry or embassy, it would be a career where service would count and training would tell, a fascinating field for the lawyer to enter. But with things as they are, the strong men fear to drop practice for several years, lest they be bundled out neck and crop by a change of party preponderance, and then come back to begin anew with clients scattered. Only wealthy or very ambitious men can well afford so to turn aside from the profession — except at its close, when a permanent injunction has been secured against the "wolf at the door."

Lawyers have relations with one another apart from the exceptional disbarment case. I refer to the relation of opponents in a case and of consulting counsel to the attorney of record. Whatever our identification of barrister and solicitor may be in law, custom and developing conditions are erecting the old difference again. Some men are peculiarly qualified to try a case before a jury, others to present an argument on appeal. Others are wise in the consulting office, others are cunning draftsmen of unbreakable instruments. A few are ready to try every form of professional work, and a *very few* are equal to such diverse demands.

The wise attorney knows when to retain counsel. It is a penny-wise lawyer who fears it will affect his income to do so. Do all you can yourself, of course, *and do it yourself, and not by a clerk,* but never discourage a client who suggests apologetically that an opinion be taken. If your opinion, already given, or your proceedings, already had, are approved by the great man who nonchalantly pockets in an hour as much as you have had to date, your client's confidence is cemented. If he sets right some oversight or error you have made, you

can only be thankful; the knowledge you thus gain is well worth the price in pride lost. Counsel of to-day are uniformly of such high character that no attorney need fear larceny of his client. Some cases of desertion by the client do occur, but the cause antedates the counsel fee in nearly every case.

Counsel owe a clear duty to attorneys who consult them personally, or as representing clients. And first of all they owe the duty of personal attention to the matter advised about. You and I can brief the law or hire a ten-dollar-a-week clerk to do so. We do not care to pay counsel's fees for a brief prepared by *his* ten-dollar-a-week clerk, and signed by him after a rapid perusal. We want *his* estimate of the situation, *his* advice as to the course to pursue. So here the attorney can often economize time and fees by the care and completeness with which he submits a matter to counsel. But if you are unequal to briefing a case properly yourself don't subject counsel to the labor of blue penciling or amputating your work. Pay him to write as well as argue the brief. But don't hesitate to urge your views upon him. You have sat up nights with your case. You see the importance of some inconspicuous fact. Don't be too modest in presenting the strongest arguments you can make, because you are diffident in face of his reputation. He may "pooh pooh" it at first; but if it be meritorious, he cannot forget it, and may make more of it in the end, because the idea has been forced upon him. He is able, that is why you retain him. But he is fallible, that is why you must not depend wholly on him. It is still *your* case and *your* client. Nor will good counsel seek to eclipse you, or refuse your work recognition. His standing is assured — he can afford to be, and generally is, generous.

Be sure your counsel is paid. Protect him, as the broker protects his bank. Never ask counsel to share his fees. It is an impropriety for him to accede to your request, and it is indecorous and unprofessional in you to suggest it.

What shall my relations to my adversary be? Shall professional antagonism in a law suit end fraternal relations? The

converse of the proposition is, shall the fact that the lawyer on the other side is my personal friend, require my granting every favor he may ask.

Sometimes the bitter feeling engendered by litigation between clients proves contagious and professional friendships are broken on the anvil of forensic strife. Two lawyers, once friends, but thus embittered against each other, may be conspicuously courteous to each other in court, and so far as practice goes *their clients get their money's worth.* But friendships are too rare to so sacrifice. Common sense is a cure-all, and memory a preventive. You can be true to your client, and fence with your friend. The advantages of knowing your adversary as a man to be trusted is that there is more certainty of getting together in a settlement when the first excitement of the suit is over. You can trust one another in your respective statements of facts. Your friendships will enable you to bear being set right on the facts, if mistaken, without loss of self-respect. You can be of invaluable service to your client if you can show your antagonist that he is on the wrong tack.

Settling a case out of court is the triumph of the attorney. It lessens his income at times, but it doubles his usefulness. Once he is known as a great man to settle disputes his pecuniary future is secure. But as Noah Davis once said, "If you have to fight — fight," which being interpreted means, put on the whole armor of the Code, motion, provisional remedy and all; compel a definite statement of the issues — perpetuate fleeting testimony; secure the corpus by attachments if you have to — or can; keep in touch with witnesses. Keep the other side on the jump; don't practice for costs, but collect them when awarded. They have an aperient effect on the mind and pocket of the enemy. Be prompt and punctual. All this is consistent with giving every professional courtesy required, that does not imperil recovery. Go easy on stipulations. Let your negotiations be without prejudice, if in writing. If you issue execution — jog the deputy. If you

examine in supplementary proceedings remember it is a fine art and better left alone than bungled. A debtor once graduated from this *pons asinorum* is practically execution proof.

Another point may be commented on: There is a class of lawyers sometimes complained of, known as "pumpers." We all have our circle of friends with whom we delight to wrangle over questions coming up in daily practice, and we often get valuable hints and help from each other's treasury of experience. That, however, is the "give and take" of friendship and in no way to be criticized. It leads often to mutual retainers, and aside from the question of friendship it pays in various ways. But the "pumper" is not so. He is even as the hypocrites are. He ringeth you up on the 'phone. He says,— to be concrete, "I see on page — of your book that you say so and so must be cited on a proceeding to sell decedent's real property for the payment of his debts. Now I have a case," which he proceeds to detail. "What would you advise me to do?" I have found the best answer and the most final to be, "I advise you to retain counsel at once." He rings off promptly. It is worse than tapping wires. It is petty larceny of the brain. And yet many do it under guise of a friendly letter containing an apparently innocent note of a case, exciting our interest and opposition, and frequently one falls into the trap, takes issue on the point, citing triumphantly a case one knows to be conclusive, and later on realizes that virtue has gone out of him, and his bank account none the richer. "Sweet are the uses of adversity."

Gentlemen, we cannot afford to take any but high ground. The law is like a rose-diamond with many gleaming facets reflecting vari-colored lights according to the angle from which we view it, and the degree of light which is shining upon it; and one's attitude to the law depends not only, therefore, upon the angle of vision from which he views it, but also on the condition of his vision.

One man assents to the proposition that the law is a jealous mistress, that she must be served with exclusive and untiring devotion, and he is never weary of studying her every whim;

another's connection with the law is that merely of a "*mariage de convenance.*" He expects his rich wife to support him and pays her just so much attention as on dividend days will ensure his receipt of funds to cover his expenses. Another's relation to the profession reminds one of the mixed and only occasionally intimate affection which is commonly said to exist between a man and his mother-in-law. He enters knowingly into the relation, but does not care how soon it may terminate, so far as his personal relation is concerned. It reminds us of the man whose better half said to him in great excitement one day, "Mamma has decided to be cremated," to which he rejoined, "All right, tell her to get her bonnet and we will go right down to the furnace."

Some enter the profession as a stepping stone. They evince no real affection for it and never trouble themselves to get into touch with the higher conceptions of duty and obligations which the thoroughbred lawyer is never without. They have studied law to complete an education; or because they think that the knowledge of it will help them to secure some more lucrative commercial position. Those of us who have embraced the law for better or worse, for richer or poorer, cannot afford not to take high grounds. We *must* keep our standards high, we *must* adhere to them at personal loss; we *must* be willing at times to incur ill-will and misunderstanding in support of them. For no lawyer liveth unto himself. If he fail in his duty to the bar, verily he hath his reward.

In closing I would summarize as follows: In his relation to his client, the lawyer owes fidelity, personal attention to the work, honest counsel to the client, rigid scrupulousness in financial matters, and withal untiring industry. He must never slight the poor man's case or neglect the petty business of his office. *Per contra,* the laborer is worthy of his hire. He is entitled to his mouthfuls of the straw he treadeth out, and self-respect demands that the ox be not muzzled. He should be his client's friend, act as a brake on his impetu-

osity or recklessness, ready with warning or rebuke, not a mere slave or servant to do any task imposed. The responsibility is his.

Out of his duty to his client grows his duty to the court. He owes respect to the office and the duty of facilitating its labors in order not to complicate his client's interests. His higher powers must be drawn upon when in the forum. Patience must supplement learning. Alertness must utilize the results of industry. Order and conciseness, thoroughness and mastery of detail, clothed in respectful courtesy will enable him to protect his cause and propitiate the arbiter thereof.

As related to the community, he must take high grounds of professional ethics; never prostitute his talents; he must be loyal to every duty, as a private citizen and as a member of his profession. Ready to rebuke every unprofessional deed, he must not be Pharisaical. "Judge not that ye be not judged." In partnership he must be honorable; to counsel or consultant, straight-forward and honest, concealing no fact nor consciously permitting suggestion of false statement to mislead. On questions of great public moment involving constitutional law or vested rights he must stand for law and order. Calm in the face of public clamor, he must never lend himself to aught that lessens respect for our courts and our Constitution.

The great lawyer, like good wine, needs no bush. He will not advertise. He will shun the petty devices for publicity so many effect. He will avoid interviews as to important cases. He will not sound a trumpet before him as the hypocrites do. A pleased customer is the best advertisement, and he whose clients are his friends, whose reputation is unblemished, who knows the law, or where to find it, is like a city set on a hill,—he cannot be hid.

LEGAL ETHICS.

ADDRESS

DELIVERED BEFORE THE STUDENTS

OF

UNION UNIVERSITY

AT

Albany, N. Y., November 12, 1903,

BY

THOMAS H. HUBBARD.

LEGAL ETHICS.

A PLEA FOR AN IMPROVED AND UNIFORM OATH FOR ATTORNEYS, UPON THEIR ADMISSION TO PRACTICE.

In the record of human achievement the work of lawyers deserves grateful and signal commemoration.

They have maintained the rights of the weak against the encroachments of the strong. They have molded the laws that protect person and proporty and prevent the relapse from social order to anarchy. They have ministered to the courts in the enforcement of those laws. They have advanced from the routine of professional employment to broader careers of statemanship and have guided the affairs of nations.

If the same records were written full and true, they would tell of many who have failed to meet the high requirements of their avocation. They would tell of craft and cunning, of injustice toward adversaries, of pitiless assault upon character, of the advocacy of the wrong, of the disregard of conscientious convictions.

It is the province of legal ethics to instruct lawyers in those rules that lead them, by the true course, to the loftiest heights and that withhold them from the false course, that descends into the depths.

These rules cover the relation of lawyers to their clients, to the court and to the public. They expound the principles that should guide the conduct of all lawyers. They deal with the

details of deportment that vary with the temperament and training of individuals.

The subject is broad. Its adequate treatment requires many addresses and forms an important part of the education of every student of the law.

The purpose of this discourse is to present one phase of the subject; to point out defects in the system, rather than to display its excellence; to advert to some rules that seem to have brought discredit to the profession and to suggest some thoughts that may aid in maintaining the higher standards.

In all time since lawyers have been known, they have been the object of censure and of sarcasm in the speech and the literature of contemporaries. Wits have ridiculed them. Serious writers have decried them.

Some part of these attacks may be disregarded as groundless abuse. Some part is a natural incident to the lawyer's occupation. He is a combatant. The contests in which he engages are a substitute for the wager of battle between parties who once fought out their causes in the field with certain disturbance of temper.

But the preponderance of censure over praise seems to show that the censure has foundation in truth. And the utterances of critics not unfavorable compel attention to the strictures.

Mr. Homer Greene, himself a lawyer, and a graduate of the Albany Law School, expressed the opinion of many lawyers in an article published more than twelve years ago in the North American Review entitled, "Can Lawyers Be Honest?" Mr. Greene considers the question with judicial impartiality. He gives lawyers credit for absolute faithfulness towards their clients. He says that the lawyer enjoys a respect and faith on the part of his clients for which the merchant, the physician, even the preacher, may well envy him. And while he asserts that there is a popular opinion in America that lawyers, as a class, are dishon-

est, he also says that the lawyer is believed to be dishonest only when his dishonesty will advance the cause of his client and retard or defeat that of his opponent in the law. Mr. Greene illustrates his subject by instances where the lawyer is required by his client to set up the defence of infancy, or the statute of limitations, to defeat a meritorious claim; by instances where he fights to suppress evidences that is prejudicial to his client, regardless of its character; by instances where, in the interest of his client, he withholds facts, known to himself, which, if disclosed, would put the case of his opponent in a better light. He speaks of concealment, evasion, exaggeration and strained logic, as usual in the conduct of a cause, if they seem to the lawyer to serve the interests of his client.

The same thought is expressed by Lord Macaulay in an impetuous sentence.

"We will not," he says, "at present inquire whether the doctrine which is held on this subject by English lawyers be or be not agreeable to reason and morality; whether it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire; whether it be right that, not merely believing, but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false."

There can be no doubt that a large part of the public believes the censure which is expressed in such utterances deserved. It would benefit the public and the profession if the distrust that attends this belief were removed.

What are its causes, and where is the remedy to be found?

The popular answer to the first question would be that lawyers are distrusted because they accept the cases of bad men;

because they advocate bad cases, or the wrong side of cases; because they urge, with equal fervor, that side of the case which they are hired and paid to urge and can be as earnest and as eloquent on one side as on the other.

Such an answer, at first glance, seems to prove a lack of sincerity on the part of the lawyer. To the superficial observer it seems incongruous that a virtuous lawyer should support the cause of a vicious client; that an honest lawyer should try to make a dishonest case prevail; that a lawyer who has principle and convictions of his own, should urge, for pay, either side of any question. Yet the answer does not present the real difficulty, nor does it suggest a remedy.

Bad and vicious men have rights of person and of property, no less than exemplary men. If their vice leads them to transgress the law, they are subject to legal punishment for specific offenses. But there is no edict of confiscation applicable to bad men. Among the vagaries of legislation no law has yet been proposed that forbids bad men to go into court, or to employ lawyers to appear in court for them. As no man is wholly good, it follows that all men are more or less bad and the exclusion of bad men from the privilege of the courts would either exclude all citizens or would call for an impracticable classification based upon degrees of badness or of goodness.

There is no reason why a lawyer should not accept a retainer from the worst or most disreputable of men, unless the retainer puts the lawyer under control of the client, or compels him to personate the client, or to execute the orders that the vice of the client invents. If the retainer has this effect, then it makes the lawyer, no matter how virtuous in person, as bad as the client for the purposes of the client's suit.

To the criticism that lawyers advocate bad cases, or the wrong side of cases there is a similar reply. There is, in a correct sense, no *bad* side of a case that has *two* sides. A case, properly

defined, is a dispute, or controversy, where each party honestly believes that he has some right, or fraction of right, that the opposing party refuses to regard. Where such a controversy has passed the limits of negotiation, or adjustment, it may properly be submitted for the decision of the court. The court may decide that neither party shall have all he has claimed. It may decide that one of the parties shall have nothing that he has claimed. Yet it does not follow that the defeated party had a bad case, or that he was on the wrong side. The honest, though mistaken, assertion of a right, or any measure of right, denied by the opponent, is the proper basis of a case. It casts no reflection upon the morals of a lawyer, though it may upon his ability, that he has espoused and urged a case, or the side of a case, that turns out to be bad in the sense that the court at last decides against it.

If it happens, as no doubt it does, that lawyer and client both see that the dispute, or controversy, involves no measure of legal right or of justice, then no basis for a case in court exists. It is merely a quarrel, that should not be obtruded upon the court, or made an item of expense to the public that maintains the courts.

Nor can the fact that the lawyer argues that side of the case for which he is retained and paid, account for the distrust with which he is regarded. The only limitation in this respect is that he shall not argue *both* sides of the same case. He may regret that he has not been retained on the side that has the greater measure of right. But it is reason for commendation and not for censure, that he can argue honestly and earnestly in support of the measure of right, however small, that he believes to be his client's.

These considerations make it easier to state the real causes for such distrust, or discredit, as attaches to the profession and practice of the law.

Prominent among these causes are two:

First of these is the fact, recognized by the ethics of the profession, that clients, and not lawyers, decide what cases shall be brought into court and control the substantial methods of their conduct in court.

The second is that lawyers are permitted to personate their clients; to say what they think their clients would say and do what they think their clients would do, in order to win their cases.

In considering the first of these causes it must be admitted that if the lawyer refuses to bring a suit at the direction of the client, he cannot be compelled by legal process to bring it. The process to which the client resorts is to take his business to another lawyer. And the ethics of the profession permit the second lawyer, as they would have permitted the first, to commence the suit against his own belief, or even knowledge, that it has no foundation in law or justice, if the client insists that it shall be brought.

The adjudications give the client substantial control of the conduct of the litigation throughout its course. They clearly settle that the client has the right to direct and control his lawyer in respect to the clients' rights of property, or substantial rights. They state that the lawyer shall have control in matters of form and procedure and shall remain untrammeled in the due and orderly conduct or the suit.

But where is the line of division between matters of substantial right and matters of form and procedure, or due and orderly conduct? Does the attorney's right to control in the "due and orderly conduct of the suit" empower him to decide whether or not to plead the statute of limitations, or of usury, or of infancy, in any given case? If he knows that a defense under these statutes will defeat a plaintiff's just claim, protect a rascal and cheat an honest creditor, has he the right as attorney to decide whether

such a defense shall or shall not be put in? If the client directs him to put a witness on the stand, may the lawyer refuse because he thinks, or knows, it will work injustice to do so? If the client directs him to put before the court documents or decisions that he knows will mislead, may he decline to follow the directions? Must he follow them where he thinks or knows that what the witness will say and what the documents will tend to prove relate to substantial or property rights of the client, and may he refuse to follow the directions *only* where he thinks, or knows, that they relate to and will affect matters of form or procedure? Is the obedience or disobedience of the lawyer to be determined by his own refinements of reasoning upon these probable effects? If the client instructs the lawyer to make certain statements or arguments in his opening or closing address, must the lawyer obey, provided the statements are pertinent and not wholly unsupported by evidence and relate to substantial rights, or may he refuse, if he thinks the statements ought not to be made?

The client's power to control in all doubtful instances is fortified by the circumstance that he is employer and the lawyer employee and by the doctrine, pushed sometimes to extreme application, that the lawyer is trustee of his client's interests, including his hopes, prejudices and passions and that, to quote the language of Lord Brougham, the lawyer "in the discharge of his duty, knows but one person in the world, his client and no other"; that "to save that client * * * he must not regard the alarm, the suffering, the torment, the destruction he may bring upon others," but "must go on, reckless of consequences, even if his fate should unhappily be to involve his country in confusion for his client."

It is true, no doubt, that lawyers in many instances dissuade their clients from bringing suits, or interposing defences that ought not to be brought or interposed. It is true that efforts so to dissuade form no small part of the lawyer's labor in consultation

with his client. But where the effort to dissuade is unavailing, it is the decision of the client and not of the lawyer that finally prevails.

The disputant in petty quarrels, whose threat at the end of a wrangle is "I will have the law on you," finds his lawyer to do his bidding.

The manager of great interests who plans suits for strategic effect, with no expectation of ultimate success, finds his.

And so it turns out that the lawyer is compelled to conduct litigations that his own conscience does not approve and to shelter himself from its reproaches by adopting the hypothetical conscience of the client.

It is not the purpose here to set lawyer and client in contrast, or to eulogize the one and disparage the other. The lawyer should be at least up to the average level of his clients, in respect of cultivation, intellect and morals. It is believed that such lawyers as are contemplated in this address do stand upon at least as high a plane.

But if, in these respects, lawyers and clients are peers, it yet remains true that the controversy, with all its attendant exasperations, is the client's controversy. Its asperities, its irritations, its impulses, its interests, are not the lawyer's, save as he receives them from the client. If he receives them in bulk, as a common carrier receives all goods that are offered; if, as the servant of the client, he carries them all through the portals and into the temple of justice; if he surrenders his own convictions to the wishes of his client, then he gives to his cases the elements that retard justice and bring the practice of the law into disrepute. He obtrudes upon the court, the passion, the prejudice, the unreason of the client. These should be left outside the court house door. The controversy that crosses the threshold should be a controversy sifted by the intelligence and shaped by the conscience of the lawyer. It should be the essence of honest difference in the assertion of rights, not the turmoil of personal dispute.

There was mentioned as another cause of distrust towards lawyers the rule, or usage, that permits the lawyer to personate his client, and, in time of stress, to substitute for his own conscience a hypothetical conscience assumed to belong to his client.

It may not be correct to say that the ethics of the profession prescribe such conduct, but it is no exaggeration to say that they permit it.

A leading authority of our own time presents the prevailing professional view of the subject in the following words: "The party has a right to have his case decided upon the law and the evidence and to have every view presented to the minds of the judges which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for error of the court, if they fall into error, in deciding it in his favor. The court, or jury, ought certainly to hear and weigh both sides, and the office of the counsel is to assist them by doing that which the client in person, from want of learning, experience and address, is unable to do in a proper manner."

Another high authority, whose ethical standards and conduct none of the profession excelled, expresses the accepted doctrine in these words: "Within a certain and definite limit it is true that the lawyer must, in the interest of his client, whenever any real case exists, sometimes forego his own opinion and surrender his own judgment and plead against his own conviction and even succeed against his own expectation."

The same authority quotes Bishop Warburton, as follows: "Though some of those who call themselves casuists have held it unlawful for an advocate to defend what he thinks an ill cause, yet I apprehend it to be the natural right of every member of society, whether accusing or accused, to speak freely and fully

for himself. And if, either by legal or natural incapacity, this cannot be done in person, to have a proxy provided or allowed by the State to do for him what he cannot or may not do for himself, I apprehend that all States have done it and that every advocate is such a proxy."

If the writers of the passages quoted were speaking for a client, they would restrain their speech by the curb of their own enlightened consciences. Others, whose consciences are less enlightened, need the restraint and help of a less elastic rule.

Agreeably to the ethics of the profession as now understood, the lawyer may, and under penalty of losing his clients, must, take into court such cases as the client directs. He may, and, at the same risk, must, conduct them in court with all the temper, prejudice and personal rancor of the client. He must conduct them in substance according to the wishes of the client. He may personate the client; speak as he thinks the client would speak, or would like to have him speak, and, discarding his own convictions and the restraints of his own conscience, shape his conduct by what he assumes to be, yet which may not be, the conscience of his client. And, under established decisions, he may say with immunity, of his adversary and of adverse witnesses, false things and even malicious things, if only they are pertinent to the cause in issue.

What wonder that, under these conditions, causeless and conscienceless litigations go on? What wonder that the profession has earned a reputation for disingenuousness? The lawyer, burdened with a cause that is urged by the client's caprice or anger, has found in neither the facts, nor the law, weapons to give him the victory the client expects him to gain. Where shall he look for other weapons? He may open his case, or his defense, by stating with warmth and exaggeration, the things his client wishes to have proved. He may impugn the motives of the adverse party. He may harass the opponent's witnesses. He

may lay traps for them and lead them into apparent contradiction. He may lay stress on immaterial matters and obscure the material. He may exclude evidence known only to himself and his client, that favors the other side. He may amuse the jury by bright or caustic personalities in respect to matters not relevant to the cause. He may use the weapon of eloquence in summing up and may give it keener edge, by ingenious misapplication of facts, misconstruction of motive, sophistical criticism of testimony, undeserved denunciation of parties.

Professional standards allow these things. There are not wanting, among distinguished practitioners, those who maintain that the rough and tumble way of conducting a legal battle, is the best way. There are not wanting those who feel in such a struggle the "*guadium certaminis.*" They hold that the court and jury will best get at the truth by witnessing this intemperate and confusing contest.

The court and jury do, in most instances, finally reach the truth, or its approximate; but they reach it at vast cost of time, waste of public money and expense of temper.

And, beyond this, there is engendered and nourished that distrust of the lawyer's honesty and sincerity that wounds his sensibilities and impairs his service.

Now, the object of every litigation should be to obtain for the litigant exactly what is of right his, without adding anything to what is his due and without subtracting anything from it. This object should be reached with the least possible expenditure of labor and time by the courts; the least practicable harm to reputation or feelings of parties and witnesses and with no sacrifice of the lawyer's self respect. It would be the perfection of litigation to reach correct and just results without wasting time of the court, increasing the public burden of expense, wronging adversaries, or witnesses, or detracting from the honor of the bar. Lawyers who approach this standard in the conduct of their litigations, bring

credit to themselves and to the bar. It is divergence from this standard that brings discredit.

But how can the standard be maintained if lawyers must conduct such litigations as their clients ordain; may personate their clients, bad or good; may discard their own convictions and adopt the assumed convictions of their clients, in the conduct of their causes and may, with impunity, say malicious and false things about their adversaries.

To disclose the causes that may bring reproach upon the bar, suggests the remedy that should be adopted.

The lawyer should be emancipated from servitude to his client in respect to the commencement and conduct of suits.

The lawyer should control in determining what cases may be brought before the court; what suits may be begun; what defences may be interposed. His appearance in any cause should be deemed a certificate, upon his honor as counsel, that it involves, in his opinion, the honest assertion of legal and equitable rights withheld by the opposing party. In all matters that involve conscience, whether matters of form or substance, the lawyer's decision should be supreme from the beginning to the end of litigation. The custom should be shattered, that permits the lawyer to personate the client; to argue against his own convictions; to substitute his client's morals and conscience for his own, in the conduct of his cause.

It is probable that clients would dislike to have litigation determined and conducted in the manner here suggested. No doubt many would claim that such a method would take something from their rights as citizens. No doubt they would consider their own consciences as enlightened as the conscieuces of their counsel and themselves as competent as their counsel to decide what proceedings and defences should be considered just.

But, conceding the conscience of the client is no less enlightened than the conscience of the lawyer, it still remains true that

the client is swayed in respect to his own case, by self interest, by excitement, by temper or animosity, from which the lawyer should be free.

Equal rights before the courts belong to all citizens; but it should be no part of the rights of any citizen to make his quarrels or disputes a public charge, nor should it be the right of any citizen to decide what controversies are fit for litigation. These questions should be decided by the lawyer. It is for this that he has, or should have, the training of a specialist. For the just decision of these questions he should be held responsible by the courts.

The change of methods here urged will not be effected by the lawyer unaided. Many prefer the existing methods. Those who do not, are unable to adopt the better method without consigning their clients to those who do.

The change will not be effected by public opinion. The public, disinterested, might approve it; but the public, individualized as clients, would disapprove. The change can hardly be effected by adjudications of the courts upon the relative rights of lawyer and client. Adjudications come too slowly, and few lawyers, or none, will make the issues that call for them.

The most effectual aid must come from the oath administered to the lawyer on his admission to the Bar and the enforcement of that oath by corresponding rules of the court.

The oath now prescribed varies in the different States. The New York statute requires attorneys to take the Constitutional oath. It is the oath prescribed for members of the Legislature and all officers, executive and judicial, except such inferior officers as shall be by law exempted. Its form is as follows: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of attorney and counsellor-at-law in the courts of record of this State to

the best of my ability." What the duties of the office of attorney and counsellor-at-law are and what their faithful performance requires, must be learned in the schools, from the books, or determined for himself by each attorney. The form gives no instruction on these subjects and imposes on him who takes the oath no obligation more specific than would an oath to be good.

Substantially the same form of oath is used in a dozen or more of the other States—in California, Colorado, Illinois, Indiana, Iowa, the Indian Territory, Kansas, Louisiana, Michigan, Nebraska, North Dakota, Wyoming, Utah. Colorado adds the requirement that the applicant must swear that he has never been disbarred or convicted of felony.

The oath imposed, upon admission to practice in the United States Courts, Supreme, Circuit and District, varies little from that given above. The applicant swears that he will demean himself in his office "uprightly and according to law," and will "support the Constitution of the United States."

Seventeen of the States have adopted this form with little variation. Texas adds the requirement that the attorney will discharge his duty to his client to the best of his ability; deeming as it would seem, that the lawyer must do something more for his client than to demean himself "uprightly and according to law." The other States and Territories that use the same form with little variation of words are Alaska, Arizona, Arkansas, Florida, Georgia, Maryland, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Virginia, West Virginia, Wisconsin.

The Clerk of the Supreme Court of Tennessee writes, "We have no special oath in this State on record. Below is the form I generally use:

"Do you promise to support the Constitution of the State of Tennessee and the Constitution of the United States, and to truly and honestly demean yourself while engaged in practice of the profession?"

To the oath to support the Constitution of the United States and of the State and to "faithfully execute the office of attorney to the best of his ability and according to law," there is added in Kentucky an oath that the candidate for admission has not fought a duel, nor sent or accepted a challenge, nor acted as second, nor aided or assisted any person thus offending.

This follows a Constitutional requirement. The Nevada and South Carolina oaths contain a similar clause about the duel.

Alabama, Delaware, Minnesota, Mississippi and Pennsylvania enlarge the scope of the oath beyond the forms used in the States already mentioned. The oath is that "you will behave yourself according to the best of your learning and ability and with all good fidelity as well to the Court as to the client; that you will use no falsehood, nor delay any person's cause for lucre or malice."

Minnesota requires her attorneys to swear that they will behave themselves in an upright, courteous and gentlemanly manner to the best of their learning and ability. Courtesy and gentlemanly bearing were perhaps taken for granted in the other states already mentioned. Perhaps they were considered non-essential.

The New England States have a form devised for attorneys as distinguished from legislators. It prescribes with some precision the duties that must be "faithfully discharged" by the attorney.

South Dakota and Oklahoma have adopted, in substance, the New England form. The oath required in the State of Maine will serve as the example of the New England oath. It is as follows:

"You will do no falsehood, nor consent to the doing of any in Court, and if you know of an intention to commit any, you will give knowledge thereof to the justices of the Court, or some of them, that it may be prevented; you will not wittingly or willingly promote, or sue, any false, groundless or unlawful suit, nor give aid or consent to the same; you will delay no man for lucre or malice; but will conduct yourself in the office of an

attorney within the Courts according to the best of your knowledge and discretion and with all good fidelity as well to the Courts as to your client."

This form, does not, like the preceding forms, leave it wholly to the attorney to decide what he must do in order to "demean himself uprightly and according to law" or to "faithfully discharge the duties of the office of attorney and counsellor"; or "faithfully to execute to the best of his ability and according to law" the office of attorney. It instructs him on some of the important duties of the attorney and by compelling him to reject false, groundless and unlawful suits, gives him some power to control his client.

But despite its injunctions and prohibitions, it leaves him a wide field for the active exercise of those arts, artifices, simulations and impersonations that have been generally characterized as disingenuous and sometimes described as dishonest.

The young state of Idaho has a somewhat novel form with a color of chivalry, yet gives the attorney no certain light. He must swear to support the Constitution of the United States and of the State and "that" he "will maintain the respect due to Courts of Justice and to judicial officers;" "that" he "will be true to the Court and to his client;" "that" he "will abstain from all offensive personality" and "that" he "will never reject for any consideration personal to" "himself" "the cause of the defenseless or oppressed."

Of the novel features of this form, the most important perhaps is that which pledges the attorney to abstain from all offensive personality. Under the other forms mentioned, and even under the rigorous New England form, he may be as offensively personal and as disagreeable as he will. Indeed, he receives some implied encouragement in that direction by the forms that inhibit duelling.

One only of all the United States prescribes for its lawyers a

form of oath that indicates their control of their clients in respect to litigation, and that points to their freedom from vassalage. This is a State tender in years, but great in name and in aspirations—the State of Washington.

This oath, though compact, is itself an essay on the subject of legal ethics.

If it shall be enforced by the courts and lived up to by the bar, it will be one of the State's best possessions.

It runs as follows: "Obligation to be sworn to by Attorney":

1st. I do solemnly swear that I will support the Constitution and laws of the State of Washington.

2d. That I will maintain the respect due to Courts of Justice and Judicial Officers.

3d. That I will counsel and maintain such actions, proceedings and defenses only, as *appear to me legal and just;* except the defense of a person charged with a public offense.

4th. To employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and never to seek to mislead the judge by any artifice or false statement of facts or law.

5th. That I will maintain inviolate the confidence and, at every peril to myself, preserve the secrets of my client.

6th. That I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.

7th. That I will never reject, from any consideration personal to myself, the cause of the defenceless or oppressed. So help me God."

The form of this obligation would be improved by inserting after the word "Judge" in the fourth paragraph the words "or jury," so that the paragraph would read:

"To employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and

never to seek to mislead the Judge or jury, by any artifice or false statement of facts or law."

But, as it stands, it is a vast improvement upon the forms of the other States. It would be worth a crusade to have it adopted by every State and enforced appropriately by the rules of every court and kept constantly before every attorney.

Its third paragraph, by the words "I will counsel and maintain such actions, proceedings and defenses *only* as *appear to me legal and just*" makes the Counsel the one who as between himself and his client, shall determine what suits and defenses shall come before the court and requires that such as come there shall appear to the Counsel to be not only legal but also just.

The 4th and 6th paragraphs forbid the artifices, exaggerations, subterfuges, evasions, suppressions, that help to make the practice of the law discreditable.

The whole oath puts the responsibility of bringing suit, interposing defense and of conducting either, exactly where that responsibility should be put, upon the conscience and honor of the lawyer.

To the aid that may be given the profession in adopting the better method by the oath of office and by rules of court to enforce its obligations, there should be added consistent instruction to the student in the schools. If all the law schools in the land should agree upon the principle and unite in teaching it, the improvement would be half accomplished. A long step would have been taken towards that perfection of litigation that it has been one purpose of this address to outline.

A sensible contribution would have been made to the honorable distinction of the coming Bar and to the success of coming lawyers.

All students of the law hope and wish to succeed. Every judge or lawyer who addresses them will say that, while the road of the law is steep and flinty, yet if the student toils courageously on he will find it leads to success.

But what is the success the speaker and the hearer have in mind?

One kind of success is shown by the receipt of large fees. If they are the return for large services and are the fair equivalent for that which he who pays them has received in service, they are one measure of success.

It is a success to gain verdicts from juries, if the verdicts are just, but not if the jury has been misled to the belief that the worse cause is the better cause.

It is a success to convince courts by argument, if the argument is founded on facts and law correctly presented.

It is a success to counsel clients so wisely that they can get their rights without needless expenditure of time and effort.

But it is safe to say of any able lawyer who has passed the passionate period of life, that he does not deem the verdicts he has won to have been successes, if they have been won by distortion of facts; by undeserved invective, by unjust aspersion of character or motive, or if their winning has taken from the opposing party something that should have been left with him.

It is safe to say of such a lawyer that he does not vaunt himself upon decisions that have followed his arguments, unless he knows that his arguments have not confused the law or misled the court.

It is safe to say of such a lawyer that he does not deem his counsel to clients an evidence of success for the reason that it has helped his clients to get what they wished, unless he can also feel that it has not helped them to get what they ought not to have had.

To have advanced the cause of truth and justice is a success, whether this has been done by winning verdicts, by getting favorable decisions or by preventing needless litigation.

The success here outlined is the only kind of success that, in the retrospect, satisfies the ambitious man whose ambition is worthy. It is the kind of success that in the prospect should be alluring to the young.

THE JUDICIAL POWER IN THE STATE OF NEW YORK.

ADDRESS DELIVERED
AT THE TWENTY-NINTH ANNUAL MEETING
OF THE

New York State Bar Association,

HELD AT THE CITY OF ALBANY, N. Y., ON THE 16TH AND 17TH OF JANUARY, 1906, AND REPRINTED FROM THE TWENTY-NINTH ANNUAL REPORT OF THE PROCEEDINGS OF THE ASSOCIATION.

By RICHARD L. HAND.

PRESIDENT OF THE ASSOCIATION.

With the Compliments of

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We have all been bred up in the unquestioning conviction that the State of New York presents one, among many state sovereignties comprising the United States, in which is exhibited a division of governmental functions into the familiar trinity of Executive, Legislative and Judicial, and that these three are alike sovereign, coequal in dignity and power and each independent of any authority of the others.

There is even a common belief, especially among lawyers, that this theoretical balance of equality and independence is practically modified by a very real supremacy, in fact, of the Judicial, because we are accustomed to consider it as having authority to pronounce void or control the acts of the other two by its construction or decree.

It will not be questioned that it is interesting and important to consider how far this is true and what is the actual position of the Judicial Department in our State government.

Referring to the several constitutions which have been adopted by the people of this commonwealth, we are at once struck by a marked difference in this respect between them all and not only the Federal Constitution but also the general form of constitution adopted by the several States. And it is very difficult to believe that this

difference is not due to a different intent, indicative of reasons of substance for the distinction.

The Federal Constitution declares that "all legislative powers, herein granted, shall be vested in a congress."

"The executive power shall be vested in a president."

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the congress may, from time to time, ordain and establish."

Here is a clear expression of division of sovereignity into legislative, executive and judicial power and a vesting of it all in the governmental agencies named; — All of the legislative power in the legislative body; all of the executive power in the executive, and all of the judicial power in the courts. Plainly no judicial power can be claimed by the executive or legislature, under such a constitution. Still more plainly must there be a judiciary, in which all of the judicial power of the nation reposes, beyond and above interference of any other person or power in the government. "The object of the Constitution," says Storey, "was to establish three great departments of government: the legislative, the executive and the judicial department. The first was to pass laws, the second to approve and execute them and the third to expound and enforce them." And again, "The framers of the Constitution, with profound wisdom, laid the corner stone of our national republic in the permanent independence of the judicial establishment."

The first New York Constitution, of 1777, in like manner, vests "the supreme legislative power" in the legislature, "the supreme executive power and authority" in a governor, while, as to the vesting of judicial power it is silent. All of the officers of the State, except-

ing members of the legislature, governor, lieutenant-governor and treasurer, were to be appointed by the council of appointment. Provision is made for a court for the trial of impeachments and the correction of errors, "under the regulations which shall be established by the legislature" and the term of office of the chancellor, the judges of the Supreme Court, the first and other judges of the County Court in every county and justices of the peace is prescribed; probate and admiralty courts are mentioned and attorneys are to be licensed by the courts in which they shall practice. Beyond this there is no provision for and hardly reference to courts or judicial power. In truth, the existence and continuance of the ordinary courts are simply assumed, but with no expression of vesting of the judicial power of the State in them or elsewhere.

This omission can hardly be attributed to inadvertence. The vesting of legislative and executive power was explicitly and emphatically declared and the judicial power cannot be supposed to have received no consideration. Why then is the Constitution without definite expression as to a subject of such evident importance?

We may, perhaps, find an answer to this question in the attitude of the people towards the judicial power.

At the time of its organization, this State was largely peopled by citizens of Dutch and English descent, and their lessons in the science of government had been learned from the experience of themselves and their ancestors under Dutch and English rule.

To consider fully the nature and influence of these experiences would involve a presentation of the evolution of law and liberty from the beginning and be manifestly impossible on such an occasion as this, even if we had the presumption to attempt it. It may be not inap-

propriate, nevertheless, to consider some of the salient features of that evolution.

The origin of their ideals of law and liberty was essentially the same in both peoples, but found quite different development under different surroundings.

The seed of American liberty may be found, I suppose, in the principle of what is known to-day, but unfortunately is now almost degenerated into a political cant, as "*Home Rule.*" It was the foundation of Aryan civilization everywhere, and it may be profitable to consider its leading features. The fundamental idea is of *the family* as the source and center of all government; wherefore the sacredness of the home and of the rights of the home has never been absent from the thinking of its peoples. The vicinage of several or many families inevitably led to consultation and union of their heads for the common interest, resulting in that form of organization known as the village community, where experience or natural ability showed its influence in the councils of free men. But in all this the guiding rule was precedent and the village council, exercising little initiative of legislation, simply declared the rights and customs known to their fathers; and thus came into existence such a body of regulations as was destined to development, perpetuation and authority, among the millions who now own allegiance to the *Common Law*, including practically the whole people of these United States to-day. For the settlement of controversies between individuals, the council called those who had knowledge of the facts. These applied to that knowledge the customs or accepted standards of justice which had come down from of old, and thus was developed *Trial by Jury*. Perhaps the strongest argument in favor of our requirement of unanimity may be found in this principle, that any result which those who

have knowledge of the facts, either personal, as under the original practice, or derived from witnesses and aided by the instruction of skilled students of the law occupying judicial station, as under our present system, cannot concur in and agree upon, should not be accepted as demanded or justified by the customs of the fathers — the common law.

Natural increase in the size of these communities and their number made it inevitable that the deliberations of the council could no longer be had in gatherings of the entire body of its membership. This became too inconvenient, if not practically impossible, and resort was had, we may say necessarily, to *Representation.* But representative government, whatever its form, and how much soever its jurisdiction was extended to the new questions presented by external pressure or internal need, affecting the people as a whole, was still *representative,* while the burgesses remained freemen and the sovereignty was retained by the people. No divine right was recognized in any ruler and the leaders were rather agents, to whom, even in war, command was given for temporary necessity, but over volunteers and to end with the passing of that necessity. It is not too much to say, I think, that this traditionary freedom was never given over by the Dutch, but remained, through all the bitter trials of their history, the theory and the aspiration of that noble race, towards realization of which they ever struggled and never despaired.

Very similar was the condition of the English people at the time of the conquest and in many of its essential features it persisted even under the Norman conqueror. The ancient liberties were preserved, the local courts recognized, unlawful seizure of property or person forbidden, the boroughs and guilds strengthened, while even

feudalism was subservient to law, to be obeyed by the lords, with respect to the rights and privileges of the people, as well as by the people, as regarded their duty towards the lords. Indeed, the people found much protection, in King and Church, from the claims of their barons, and in the barons from the claims of King and Church; most conspicuously illustrated in the wresting from King John of the *Magna Charta* of English liberties. What hopes and joys were found in such pledges as these:

That the English Church shall be free and shall have her whole rights and her liberties inviolable. We have also granted to all the freemen of our Kingdom, for us and our heirs forever, all the underwritten liberties, to be enjoyed and held by them and by their heirs — specifying, among many others: No freemen shall be seized or imprisoned or dispossessed, or outlawed or in any way destroyed nor will we condemn him excepting by the legal judgment of his peers or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice. All merchants shall have safety and security in coming into England and in staying and in traveling through England, as well by land as by water, to buy and sell, without any unjust exactions, according to ancient and right customs. It shall be lawful to any person, for the future, to go out of our Kingdom and to return safely and securely, by land or by water. If any have been disseized or dispossessed by us, without a legal verdict of their peers, of their lands, castles, liberties, or rights, we will immediately restore these things to them. All fines that have been made by us unjustly, or contrary to the laws of the land and all amerciaments that have been imposed unjustly or contrary to the laws of the land shall be wholly remitted. Also all of these customs and liberties aforesaid, which we

have granted to be held in our Kingdom, for so much of it as belongs to us, all our subjects, as well clergy as laity, shall observe towards their tenants, as far as concerns them. There shall be one measure of wine throughout all our Kingdom and one measure of ale and one measure of corn. Also it shall be the same with weights as with measures. Common Pleas shall not follow our court, but shall be held in some certain place. We will and grant that all cities and burghs and towns and ports should have all their liberties and free customs.

From this time on, for centuries, the history of England is the history of a struggle for the recognition and enforcement of personal liberty and the rights of citizenship — the evolution of democracy under the cover of a monarchy. And doubtless the most important and significant thing in this evolution is the rise and development of the Commons, wherein the burdens of feudalism, the extreme claims of royal prerogative and the absolutism asserted for the church, instead of resulting in the destruction of liberty and the maintenance of despotism became important agencies — unwilling and unwitting agencies — in the growth of that democracy, from its local and feeble beginnings to the majestic dignity and power of the elective house in an omnipotent parliament. In truth, the selfish quarrels of King, church and barons were the opportunities of the people, and the very tyrannies and abuses inflicted upon the latter were the means of arousing the spirit and strengthening the purpose to be free. The famous expression of Tertullian: "*Semen est sanguis Christianorum*," needs little change to be applicable here.

So long as the National Council was an assembly of the great lords of the realm, the resources of the government were but imperfectly available and it was only by

direct representation of the shires and towns that this difficulty could be obviated. The barons desired such representation, in aid of themselves against the crown, and the King found in it a readier means of obtaining grants and supplies, binding upon all classes of the people. These representative knights of the shire were chosen in the shire court or county court, which embraced the whole body of freeholders and, as no provision was made for distinguishing the vote of yeoman from that of squire, in practical result the whole body of freeholders entered into the responsibilities of citizenship by taking part in the choice of legislators.

In like manner representation of the boroughs and towns was strongly desired, for the like purpose of taxation, until Edward the First, following a precedent given by the noble hearted and patriotic Simon de Montfort, thirty years before, but from vastly different motive, summoned two burgesses from every city, borough and leading town to sit in his parliament of the year 1295. His wisdom seemed to be justified in the result, for these representatives of the people proved complaisant enough and the King found his revenues readily granted and largely increased by legal impost upon the whole property of his Kingdom. Indeed, the people now taxed themselves upon the royal request. But neither King nor Commons dreamed of the final outcome. These modest burgesses and knights of the shire, overawed by the presence of the great lords and conscious that they were there only for the purpose of taxing themselves and their neighbors, having no ambition to claim any power of legislation, were the last to foresee the time when they would hold the Nation's purse and make the Nation's laws. In truth, finding their new honors burdensome and their part in the government irksome,

they were far from eager to give their attendance; and it was not until half a century later that they became separated into the Commons. Even then they were rather petitioners to the King than legislators, until the concession was made that, upon assent of the crown to their petitions, these should be entered upon the rolls of parliament and thereby become statutes of the realm.

But nothing is more characteristic of both Dutch and English than the tenacity with which they hold to an advantage once gained, and every civil or foreign struggle — every necessity of the Crown for revenue — was an occasion for demanding, as a condition of their aid, some new extension of the people's privileges or guarantee of their liberties, accompanied by steady growth of their power and clearer recognition of their rights. These more and more took the form of charters and laws, solemnly ratified by all other estates of the Kingdom and of permanent authority and binding force, until, on the one hand, parliament had become supreme in authority and, on the other, the rights and liberties of the people had found expression and safety in laws of their own making.

All of this, however, was accomplished against the will of the Crown and its accomplishment was the result of an unceasing contest, in which the people rarely found support in the judicial department of their government, regarding it, rather, as a powerful agency of tyranny and oppression.

Although the people of England have never been without local courts for the settlement of minor controversies and maintenance of peace, yet their history is full of oppression through the judicial power. The *Aula Regis* of William the Conqueror, receiving appeals from all the courts of the barons and determining the estates, hon-

our, and even lives of the barons themselves, composed of the great officers of the crown, holding their position at his pleasure and presided over by the King himself, was the farthest removed from any guaranty of the liberties of the subject and the last resort for any protection of their rights; being, instead, the visible organ of his power and expression of his will.

Notwithstanding the immense advance in dignity and freedom of the judiciary, sustained by the authority of parliament, the judicial power of England is still vested, at least theoretically, in the Crown. It is a part of the royal prerogative. The King is the chief of all the courts, all procedure is in his name; he is the universal proprietor; the superintendent of commerce; the Judges are his substitutes, the judgments bear his seal and are executed by his officers. He is above the reach of all courts, his person sacred and inviolable. Hence the maxim "The King can do no wrong." He has been called "the fountain of justice" and appoints all judicial officers, who are regarded as his deputies, and is the source of their jurisdiction. And, although the Act of 16 Charles I, abolishing the star-chamber, declares that "neither his majesty nor his privy council have, or ought to have, any jurisdiction, power or authority to examine or draw into question, determine or dispose of the lands, tenements, goods, or chattels of any of the subjects of this Kingdom," this, I take it, can only be saved from condemnation as an unconstitutional encroachment upon the royal prerogative, in a time of practical revolution, by referring it to the provisions of the great charters for trial by jury.

Our English ancestors, at the time of our revolution, had been constrained to regard the judicial power as a part of the royal prerogative and inseparably connected with

the executive, while they had experienced, for generations, the evil of having its exercise committed to creatures of the King's appointment — too often discharging their functions in obedience to the will of tyrants, in shameless disregard of the interests, rights and liberties of the people. As Sugden says of the era of the English Revolution: "In the minds of thinking men of that period the Judges were the arbitrary and servile tools of the Crown. With them the judiciary was represented by the corruption of Bacon, the servility of Herbert and the cruelty of Jeffries; the atrocities of the bloody assizes, the lawless despotism of the ship-money judgment and the scandalous illegality of the dispensing power."

Even after the great improvement introduced by the 12th and 13th William *III*, in 1700, by which the tenure of judicial office was changed from *de bene placite* to continued good conduct — *quam diu se bene gesserint*, they were still regarded with suspicion as agents of a vicious system of privilege and a bloody code of criminal law and characterized by Parr as "the furred homicides."

Nothing in the colonial history of this State tended to weaken the distrust. It was rather intensified by their experience here. By the instructions from the Duke of York for their government, the colonists were denied power to choose their local magistrates and "the choice of all the officers of justice was solely to be made by the Governor." The Justices of the Peace for each riding were thus named by him and held office only during his pleasure, and the Governor, or any of his councillors, might preside in their courts; while the Supreme Court of the Province was composed of the justices with the High Sheriff and the Governor and his Council. The arbitrary and oppressive measures of such a governor as

Lord Lovelace soon tested the quality of such a court, when the remonstrances of the people against his illegal acts were characterized by it as "false, scandalous, illegal and seditious," while the Governor and Council ordered the papers burned and their chief promoter to be prosecuted.

We need not dwell upon these causes that led the colonists to guard themselves against judicial power, which, to their thinking, was too closely allied to the executive and to royal prerogative, and to feel strongly the necessity of retaining the entire sovereignty in their own hands. All was peculiarly intensified, in the province which became the State of New York, by the much greater exhibition here of loyalty to the Crown and the numerical and social strength of the Tories, by which the Revolution, in this State, assumed so largely the character and the bitterness of a domestic war. Nor were they unfamiliar with such a theoretical depository of the sovereignty for, as Coke had expressed the theory of the English Constitution:

"The power and jurisdiction of Parliament is so transcendent and absolute that it cannot be considered, either for causes or persons, within any bounds." And Blackstone had said: "It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, revising and expounding of laws, covering matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal, this being the place where that absolute, despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these Kingdoms. * * * So long as the English Constitution lasts, we may venture to affirm that the power of parliament is absolute and without control."

It is true that Lords and Kings were embraced in this conception of parliament; but, as the colonists had rid themselves of the King and had no lords, nothing remained to embarrass them as *the people* in realizing their ideal of free government by adopting a charter of their rights and liberties in the Constitution of 1777.

And how did their conception find expression?

The controlling idea is expressed in the first clause:

"That no authority shall, on any pretense whatever, be exercised over the people or members of this State, but such as shall be derived from and granted by them." Evidently no court could claim any jurisdiction whatever, under this Constitution, excepting upon such grant of authority as can be implied from the mere recognition of its existence which follows. There is no express grant of authority anywhere, although legislative and executive power are specifically granted to the proper agents of the people.

How completely the people retained the sovereignty may be readily seen.

Their more direct representatives, the assembly, were chosen every year. They elected the governor every three years; senators every four years, and the Assembly controlled in selection of the treasurer. Senators, selected by the Assembly annually, were absolute in the Council of Appointment, which named every judicial officer in the state, and these holding office during good behavior to the age of sixty, would inevitably be retired at frequent intervals. The decision of all appeals, at law and in equity, was controlled by the Senate, which also controlled the result in cases of impeachment, which must originate with the Assembly. And all this is greatly emphasized by the significant omission of any direct grant of judicial power. All the more significant when we

recall the fact that all jurisdiction in equity had been usurped by the Governor and his Council, in colonial times, and this had been bitterly denounced as "contrary to law, unwarrantable and of dangerous consequence to the liberties and properties of the People."

How different is the language of other constitutions. We have already pointed out the formal and explicit language of the Federal Constitution. Still more solemn and impressive is the guarding of the judicial power in those of most of the states. In that of Massachusetts we find a type, which appears, in substance, in most of the others, expressing the sanctity of the judiciary in the following words:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end, it may be a government of laws, and not of men."

A single example further, to be found in New Jersey:

"The powers of government shall be divided into three distinct departments — the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided."

Is it not clear that the peculiarity of our first Constitution was due to a settled distrust of the judicial power and consequent unwillingness to recognize it as a distinct and independent branch of government and depository of sovereignty, equal in dignity and independence with either the executive or legislative? Some indica-

tion of this feeling may be found in an "Address to the People of the State" issued by a Committee of "the violent Whigs," on the occasion of alleged setting aside of a legislative Act in 1784, declaring, as follows:

"That there should be a power vested in Courts of Judicature, whereby they might control the Supreme Legislative power, we think is absurd in itself. Such powers in courts would be destructive of liberty and remove all security of property."

The Constitution of 1821, so far as its provisions bear upon the question, rather emphasizes those of the first Constitution than otherwise. It broadens the elective franchise, while reducing the executive term to two years, and it gives to the legislature absolute power of removal of all officers holding office during good behavior. It substitutes the Governor and Senate for the Council of Appointment and gives to the Governor the same check upon legislation which had been held by a Council of Revision. It repeats the vesting of the legislative power in the Legislature and the executive power in the Governor, but is equally silent as to the vesting of judicial power.

Under the operation of these two Constitutions there arose and increased a spirit of hostility to an appointive judiciary and resentment of its real or supposed freedom from responsibility to the people and arbitrary temper, intensified and almost to the point of violent, open resistance, by a conviction, in many portions of the State, that the courts were controlled by the large landlords and the decisions were unjust and oppressive, in disregard of manifest rights of the common people; which resulted in the radical changes of our third Constitution, in 1846.

Three of these changes were of especial importance in connection with the judicial power, viz.: making the judi-

ciary elective, by direct vote of the people, prescribing short terms for the judges, and, consequently, occasioning frequent elections, and authorizing control of Procedure by the Legislature. The first two had but one purpose, hardly disguised, which was to render the judiciary still more dependent on the popular judgment upon its discharge of its functions, capable of change in its personnel at the popular will and to cause its work to be performed under the influence of a direct temptation to so discharge its duties as to win popular favor and thus secure re-election. The evil of this last is manifest to all and, notwithstanding the great benefit which has resulted in so many cases from the re-election of learned and honorable judges, there would seem to be no escape from its disadvantages in any changes less radical than to a single term and ineligibility for the succession.

The effect upon the character of the judges or their work, it is no part of my purpose to discuss. Sufficient to say that experience has induced a lengthening of the judicial term to nearly double that fixed by the Constitution of 1846.

But the introduction of direct legislative control of procedure has produced extraordinary and, doubtless, unforeseen results and was, in itself, the most significant evidence of the peculiar position of the judicial power in our constitutional system. Such control was declared in the indirect way of requiring the appointment by the Legislature of a commission to reform practice and proceedings of the courts of record and to report thereon to the Legislature, subject to its adoption. The result, as is well known to you all, was the adoption and enactment as law of the Field Code.

No discussion of the alleged merits or defects of the new procedure is proposed; but I cannot doubt that, if

the judicial power had been plainly vested in the courts by any clear constitutional provision — if the Judiciary had really been recognized as one of a trinity of sovereignty, equal in dignity and independence with the Legislative and Executive, or there had been any desire or intent to make it such, no scheme of dictation to it by the Legislature would have been tolerated for a moment. But the Constitution of 1846 — and the same is true of our present Constitution — makes no such declaration as to the judicial power. Both are content to do, practically, what the first Constitution did, simply recognize the Courts: "There shall be a Court of Appeals." "There shall be a Supreme Court."

The practice or procedure of a Court is simply the form or method in which it exercises its jurisdiction; brings suitors and subject matter to its bar and determines the questions which it entertains. As a distinct governmental agency, vested with a certain department of sovereignty, it should be no more subjected to interference with the manner of its exercise of that sovereignty, by enactment of the Legislature, sanctioned by the approval of the Governor, than the Legislature or Governor should be subjected to its interference with the manner of their discharge of their respective functions. And if the Legislature has a right to so dictate, manifestly the courts are at its mercy and, under pretense of reforming their practice, it can make it so burdensome and difficult as to practically defeat it altogether and thus deprive the courts of all jurisdiction.

The fate of an attempt by Congress to interfere with procedure in the State Courts, when the financial necessities of the Civil War compelled resort to every form of taxation within its power, illustrates this principle. A stamp tax was imposed upon the process of State Courts,

and many of you remember the time when, for a period, every summons bore a fifty-cent United States internal revenue stamp. This encroachment of the Federal Government was ended, however, almost as soon as challenged, and upon the principle, expressed by a distinguished jurist of our own State, Mr. Justice Nelson, in *The Collector v. Day* (7 Wall., at page 127): "In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government whose means employed in conducting its operations are subject to the control of another and distinct government, can exist only at the mercy of that government." The principle remains, if we so paraphrase this language as to say: "Any department of government, whose means employed in conducting its operations are subject to the control of another and distinct department, can exist only at the mercy of the latter."

Entirely aside from the question of how far our procedure has been or has not been improved by this legislative interference, all must recognize that one evil, of great magnitude, has resulted. The procedure, to its minutest detail, is now governed by positive statute, which, like every other statute, may be claimed to be in need of judicial construction. It follows that our present system presents nearly 4,000 *laws*, the meaning of each of which may be challenged by any attorney, whose real or supposed interest prompts such challenge, and must then receive from the Courts judicial construction. This, I take it, is the real cause of the enormous multiplication of cases on practice, to the distress and almost despair of Bench and Bar.

Another indication of the dependent position of our Judiciary is to be found in the provision of the present Constitution by which our intermediate courts of appeal

— the Appellate Divisions — are composed of Justices assigned to that duty by the arbitrary selection of the Governor, who also selects the Presiding Justices thereof. Such assignment is usually considered, as it should be, a promotion, to be honorably desired and highly esteemed, and it is unnecessary to discuss the tendency of placing it at the unqualified disposal of the Executive. All this is perhaps still more applicable to the power given to the Governor, under certain conditions, of transferring to the Court of Appeals four Supreme Court Justices selected by himself, and the power which the Legislature has conferred upon him, with very doubtful warrant, of appointing extraordinary terms of the Supreme Court, fixing time and place therefor, and, except of the Appellate Division, naming the Justice to hold the same, upon his simple opinion that the public interest so requires.

It is true and very fortunate for the welfare of this State that the Judges early *assumed* their independence and lawful enjoyment of judicial power, and, upon this assumption, claimed and exercised jurisdiction to bring executive or legislative acts to the test of such restrictions as were found in the Constitution. But it is instructive to observe that in *The People v. Pratt* (17 John., 195) — perhaps the first reported assertion of such jurisdiction — Chief Justice Spencer found his warrant in the decisions of the Supreme Court of the United States, where the judicial power is expressly vested by the Federal Constitution. Indeed, it is probably true, as suggested by Chancellor Kent, that the Council of Revision, composed of the Governor, Chancellor and Justices of Supreme Court, whose records he characterizes as "a monument of the wisdom, firmness and integrity of the council," exercised such useful supervision that no earlier case of unconstitutional legislation was presented

in litigation. It must also be remembered that, by the time when this decision was made, in 1819, the whole country had become familiar with this view of the vesting of the judicial power, through the decisions of the Federal Courts and those of other States, in which all judicial power had been expressly vested by their several Constitutions.

To all this it may be answered that our system, under all of our Constitutions, has worked well and the authority of our Courts has not been seriously questioned. And this must certainly, in a general sense, be admitted. But that authority, to the eternal honor of Bench and Bar, has been found rather in the learning, purity and dignity of the Judges than in any wisdom displayed in framing our Constitution. They have recognized the vital necessity to good government of an independent Judiciary, powerful to restrain tendencies to excess or usurpation in the other branches of government, and, encouraged by the attitude of Courts at Washington and in other States, have boldly asserted the like position for themselves, without too critical analysis of our charters to find its absence from them. They have felt that the judicial power must be somewhere, and should be in the Courts, and have believed themselves justified in claiming it for themselves. And all has gone well. Even so, as appears from the historical sketch by Judge Vann, in *Matter of Steinway* (159 N. Y., 250), the claim rests upon legislative enactment and the Legislature has assumed authority to declare its extent, by section 217 of the Code of Civil Procedure, and that it is created and limited by the Constitution and *laws* of the State. While, in case of any serious conflict of authority, involving great popular excitement, what safety would be found in the most emphatic declaration as to its own

power, made by the Judiciary, in the absence of all express grant in the Constitution?

But how manifest is the change in our people! How many thousands, escaping from practical slavery, have not only reached our shores, but obtained citizenship, who hardly distinguish law from tyranny — whose conception of liberty is the absence of all law! How steadily grows the cloud of that threatened storm of envy and hatred of the vast accumulations of wealth and unbounded display of luxury, which have become so familiar to us! How conspicuously presented on every hand are the breaches of trust, corruption in politics, every form of that moral decay, so expressly defined in current slang by the word "graft!" Can it be questioned that among our people, as a whole, there is rapidly growing want of confidence in the Courts and contempt for the position and authority of our Judges?

On the other hand, we have been favored, at our last regular meeting, with a learned and somewhat impassioned argument, by a member of our Association, for the practically unlimited sovereignty of the Executive, "uncontrolled by Congress, unrestrained by the Courts, vested with plenary constitutional power and absolute constitutional discretion — a sovereign over 80,000,000 people," because, forsooth, the President is required to take an official oath "to faithfully execute the office of President," and "preserve, protect and defend the Constitution;" happily oblivious of the fact that all federal officers, and officers of this State, are equally bound by oath to support the Constitution. The like claim might be made, with hardly less force, as to our own Governor. This, we think, must be regarded as another "sign of the times."

The words of Hamilton are still true, that "the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachment." * * * That the judiciary is beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks." "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." The warning of Washington is still needed — perhaps more than ever needed: "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism." And these should impress themselves the more strongly, in our State, where the Constitution has left the judicial power in so anomalous and indefinite a position.

Let the Bar of the Empire State, then, and particularly this honored Association, never fail in support of the independence, dignity and power — the sovereignty — which the Judiciary has so worthily assumed and so admirably exercised, so that these may never be lost or called in question. Let us exert our every influence towards the selection of fit men and sustaining their just authority. Let us never excuse or condone such conduct on their part as shows them morally unfit for the judicial position; and let us jealously guard the judicial power from every encroachment by the Executive or Legislative departments of the State, "to the end it may be a government of laws and not of men."

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1879-80.

1879.

SEPT. 2, Fall Term begins.
NOV. 21, " " ends.
" 24, Winter Term begins.
DEC. 22, Holiday Vacation begins.

1880.

JAN. 5, Winter Term resumes.
FEB. 27, " " ends.
MAR. 2, Spring " begins.
MAY 21, " " ends.

CALENDAR,

1880-81.

1880.

SEPT. 7, Fall Term begins.
NOV. 26, " " ends.
" 30, Winter Term begins.
DEC. 20, Holiday Vacation begins.

1881.

JAN. 3, Winter Term resumes.
MAR. 4, " " ends.
" 8, Spring " begins.
MAY 27, " " ends.

STUDENTS.

1879-80.

NAME.	Residence.	City Address.
BELLOWS, EDWIN P.	*Gloversville.*	5 Clinton Place.
BENNETT, JAMES J.	*Albany.*	5 Charles St.
BOGERT, TAYLOR O. [*N. S.*]	*Alexandria Bay.*	12 Chestnut St.
BOOTHROYD, JAMES T.	*Newburgh.*	61 Lancaster St.
CARTWRIGHT, CYRUS M.	*Roxbury.*	190 Jay St.
CHILDS, WILLIAM A.	*Conneaut, Ohio.*	16 Jay St.
CHURCH, FREDERIC H.	*Friendship.*	74 Eagle St.
CONKLIN, DOUGLASS [*N. Y. U.*]	*Huntington, L. I.*	126 State St.
COOK, CHARLES R. [*McG. U.*]	*Hemmingford, Que.*	256 Hudson Ave.
CORNELL, CHARLES E. [*C. C.*]	*Albany.*	136 Eagle St.
CRANE, WILLIAM H. [*N. Y. U.*]	*Port Jervis.*	22 Jay St.
CUTLER, EDWARD D.	*Schenectady.*	43 Jay St.
DAVIS, HENRY W.	*Alburgh Sp's, Vt.*	239 Madison Av.
DAYTON, JUDSON	*Milton.*	665 Broadway.
DEAN, WILLIAM E.	*Fishkill.*	70 Jay St.
DUCKWITZ, FERDINAND H.	*Lockport.*	256 Hudson Ave.
ECKELS, JAMES H.	*Princeton, Ill.*	61 Lancaster.
ELLWANGER, WM. D. [*Y. C.*]	*Rochester.*	262 Hudson Av.
ERNST, CHAS. B. [*Mt. St. M. C.*]	*Rochester.*	17 Park St.
FOX, JOHN H. [*D. C.*]	*Winchendon Mass*	202 Hamilton St.
GLEDHILL, WALTER M.	*Castile.*	17 Park St.
GRANT, JOHN P.,	*Stamford.*	280 Clinton Ave.
GREEN, LINDSEY [*N. S.*]	*Coeymans Hollow.*	16 Jay St.
GUTHRIE, WM. R. [*D. C.*]	*Troy, Iowa.*	329 Hamilton St.
HAILES, CHARLES J.	*Albany.*	197 Hamilton St.
HALPEN, DANIEL P. [*C. U.*]	*Albany.*	37 S. Ferry St.
HARDIE, ROBERT W.	*Albany.*	15 Dallius St.
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JONES, HADLEY.	*Herkimer.*	126 State St.
KAHMANN, J. WILLIAM.	*Washington, Mo.*	189 Hudson Ave.
LARY, HERMAN S.	*Albany.*	71 Hamilton St.
LAWSON, JOSEPH A.	*Albany.*	44 Lancaster St.
LYON, NATHAN L.	*Franklin.*	126 State St.
MAHAN, BRYAN F.	*New London, Conn.*	126 State St.
MARKEL, HENRY A. L. [*Wit. C.*]	*Ashland, Ohio.*	12 Chestnut St.
MCCLELLAN, GEORGE.	*Chatham Village.*	239 Madison Av.
MCGRANAHAN, WILLIAM J.	*Rosendale.*	193 Hudson Av.
MILLER, DEWITT C.	*Freeport, Ill.*	13 Lancaster St.
MILLER, JERVIS L.	*Indian Fields.*	342 Madison Av.
MIX, FREDERIC L.	*Kinderhook.*	88 Hawk St.
MOFFAT, EDMUND J. [*C. U.*]	*Albany.*	134 Wash'n. Av.
MURPHY, JOSIAH R.	*Woodstock, N. B.*	13 Lancaster St.
MYERS, MAX.	*Albany.*	12 First St.
NIVER, FRANK S.	*Bath-on-the-Hud'n.*	99 State St.
NODINE, ALDEN [*N. S.*]	*Coeymans Hollow.*	342 Madison Av.
NORTON, NATHANIEL W. [*D. C.*]	*Buffalo.*	202 Hamilton St.
OMBONY, JOHN, JR.	*Peekskill.*	51 Maiden Lane.
OSGOOD, JOHN E.	*Fort Edward.*	
PATTIN, WILLIAM B. [*C. U.*]	*Fort Plain.*	20 Jay St.
PERKINS, JOHN B.	*Port Henry.*	17 Park St.
PERRIN, EDWIN O. JR. [*Y. C.*]	*New York City.*	46 N. Pearl St.
REED, EDWARD T. [*Y. S. S.*]	*Albany.*	154 State St.
REYNOLDS, LOUIS H.	*Valatie.*	5 Clinton Place.
ROLLINS, HERB'T M. [*I. W. U.*]	*Henry, Ill.*	
ROWLAND, ORVILLE L.	*Rowland, Pa.*	5 Clinton Place.
SEXTON, ALLAN H. [*Mich. U.*]	*New York City.*	87 Columbia St.
SHAW, WILLARD P.	*Delhi.*	239 Madison Av.
SMITH, GEORGE W. [*N. S.*]	*Roxbury.*	338 Wash'n. Av.
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STEVENS, WILLIAM D. [*N. S.*]	*Mt. Vision.*	68 Eagle St.
SWEENY, EDWARD.	*Red Bluff, Cal.*	13 Lancaster St.

TALBOTT, FRANK W. [*S. U.*]	*Syracuse.*	16 Jay St.
TOMPKINS, MYRON N. [*C. U.*]	*Ithaca.*	70 Jay St.
ULLERY, ALONZO B.	*Fort Plain.*	20 Jay St.
VANSANTVOORD, SEYM'R [*U. C.*]	*Troy.*	
VAN WIRT, P. CAMPBELL.	*Melrose.*	185 Hudson Av.
WALKER, ALBERT D.	*Greenbush.*	Greenbush.
WATERS, ALFRED N.	*Trempelean, Wis.*	665 Broadway.
WELLS, WALTER [*U. C.*]	*Johnstown.*	17 Park St.
WILLSEA, J. BARNARD.	*Lima.*	329 Hamilton St.
WHITCOMB, DARWIN E.	*Cambridge.*	329 Hamilton St.
WHITCOMB, WALTER S.	*Keene, N. H.*	17 Park St.
WHITE, WILLIAM J.	*New Bedford, Mass.*	140 Hudson Av.
WORCESTER, ED'N D., JR. [*Y. C.*]	*Albany.*	88 Lancaster St.
YEOMANS, WARD B. [*M. U.*]	*Cold Spring,*	189 Hudson Av.
YOUNG, CHARLES O. [*P. C.*]	*Port Jervis,*	43 Jay St.

ABBREVIATIONS.

D. C.	Dartmouth College.
C. C.	Columbia College.
C. U.	Cornell University.
I. W U.	Illinois Wesleyan University.
M U.	Madison University.
McG. U.	McGill University.
Mich. U.	Michigan University.
Mt. A. C.	Mt. Allison College.
M. St. M. C.	Mt. St. Mary's College.
N. Y. U.	New York University.
N. S.	Normal School.
P. C.	Princeton College.
S. U.	Syracuse University.
U. C.	Union College.
U. S. N. A.	U. S. Naval Academy.
W. C.	Washington College.
Wit. C.	Wittenberg College.
Y. C.	Yale College.
Y. S. S.	Yale Scientific School.

CLASS ORGANIZATION

Class of 1880.

CLASS ORGANIZATION.

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HADLEY JONES,	*Vice-President.*
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HENRY A. L. MARKEL,	*Secretary.*
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25 Members.

Annual Circular.

With the opening of the Fall Term of 1879–80, the Albany Law School began its twenty-ninth year of successful work. It is almost the oldest institution of the kind in the Union, there being at the time of its organization but one other Law School of any reputation in existance, viz : the one at Cambridge.

Since 1851, over twenty-five hundred students have attended its lectures, and its graduates, dispersed throughout the nation number many of the most successful and honorable men in the profession of the law. From their ranks the bench has been frequently recruited.

Its instructors have always been men of repute and standing, both for professional learning and personal character.

Among them may be named Judges IRA HARRIS, AMASA J. PARKER and WILLIAM L. LEARNED, of the Supreme Court ; the late Judge WILLIAM F. ALLEN of the Court of Appeals, and the late Profs. AMOS DEAN and ISAAC EDWARDS, the latter of whom is widely known as an author on legal subjects.

Under rule Two of the New York Supreme Court students applying for admission "must sustain a satisfactory examination upon the law of real and personal property, contracts, partnership, negotiable paper, principal and agent, principal and surety, insurance, executors and administrators, bailments, corporations, personal rights, domestic relations, wills, equity jurisprudence, pleadings, practice, and evidence, and the rules of the court "—a field

of study broad enough to require much close reading. How many students at law prepare themselves for a searching examination upon all these subjects? Preparing for a profession, or in studying a science or an art, our young men resort with one consent to a professional school; and it is now conceded on all hands, by the bench and the bar, that a special course of study under competent instructors is one of the best means of securing that familiar knowledge of the law which fits a man to deal with the important matters of justice and equity.

Facility and accuracy in practice are best acquired in an office; and the study of Law in its principles, is prosecuted with the greatest advantage in a School of Law. The present condition of the Common Law, combined and blended in a system of remedies, renders both of these modes of study quite indispensable. While the student must learn the practice, he must also master the law as a science; he must study it in its different branches, and learn to apply it to facts and transactions as they may arise in the ordinary course of life: he must discern the purpose of the law, he must appropriate its spirit, its conservative wisdom — that public policy which upholds and enforces so many of its rules. Impressed with this belief, we adhere to our long established course of one year; one year added to a previous course of reading, without excluding beginners.

The recent rules of the Court of Appeals favor a course of study in a law school. Requiring one year's study in an office, they permit a student to fill out his clerkship, at its beginning or at its close, in a school devoted to the study of the law. (Rule 3 as amended March 19, 1878.)

After twenty-eight years of successful work, we reproduce the words and intend to perpetuate the spirit, of the founders of this school.

"The Trustees and Faculty submit the following as their reasons for organizing a Law School — the objects they propose, the methods adopted for their accomplishment, and the facilities they have it in their power to offer for teaching the various branches of the law both as a SCIENCE and an ART. They have felt the great and almost total want of all the aids so easily furnished, and so very essential, in enabling the young lawyer to start successfully in his professional career. The student of medicine and surgery can resort to schools in which he can be thoroughly instructed in all the principal branches of his profession, while the student of law enjoys few opportunities for acquiring anything more than he is enabled to obtain by reading in a lawyer's office. This furnishes very imperfect means either of rendering him a sound, well-read lawyer; a ready, correct practitioner; or a fluent and effective speaker. He usually commences with few, if any, general directions as to his course of reading, and is seldom, or never examined as to what he has read. Having no previous ideas in reference to legal principles, he reads with very little benefit. He has no landmarks to guide him, no fixed points to which he can refer, and around which he can arrange his acquisitions. Besides, the law, in some of its features, is subject to great changes. New principles and practices are introduced, and old ones cease to possess their original force. Even those which are regarded as well settled are being modified to satisfy new wants, to

meet the exigencies of new branches of business, or to be come adapted to the requisitions of an ever refining, enlarging and progressing civilization. Amid this succession of principles, these variations and modifications in the direction and operation of their vital forces, how is the unaided student to be guided in his reading ; how enabled to avoid the treasuring up of obsolete principles ; how prevented from mingling error with truth — thus laying him under the necessity, when in actual practice, of unlearning much that he has acquired, and of acquiring much that he has never learned. All this to a lawyer's mind, is sufficiently obvious. He has realized it all. He has also felt the force of another and a higher truth ; viz : that the *mere learning of law is not learning how to practice it.*

"The student who is quietly reading law in the corner of an office in a country village, or even in a city, may imagine he is preparing himself to climb the heights of his profession, and may entertain dreams of future greatness ; but he little apprehends the stern realities that will cluster around him when he comes to assume the responsibilities of business. Who would think of committing a ship on the ocean to the guidance of a youth who had only studied navigation in his closet ? And yet he would be equally as well fitted to direct it successfully through sunshine and storm as the young legal practitioner would the trial of a cause when he first emerged from the recess of a lawyer's office, with no more knowledge or other resources than were there accessible.

"Impressed with this view, and feeling strongly the urgency of the demand for a method of instruction which shall be conducted on correct principles, and with the de-

sign of instructing the student in the art as well as in the science of the law — of fitting him to enter at once upon the successful practice of his profession, the Trustees have organized a Law School, which they hope and trust will meet and satisfy the wants of the present time. It is their intention to make it one of the most thorough Schools in the Union.

"Our main object is to aid the student who enters upon the study with a view to the profession. At the same time we receive many young men who pursue the study of the law as a means of useful and liberal education. With us, as in other countries, a knowledge of the law is important to the scholar, the statesman and the man of business."

Departments and Topics.

The Faculty, in order to systematize their labors, and thus render them the more effectual, have arranged the legal topics upon which they lecture in several branches. Three terms complete the course of instruction. A student commencing with any term, by attending that and the two succeeding ones, will complete the course; and may become a candidate for graduation; and as one term is not much dependent upon another in the study and mastery of its appropriate topics, the student may enter at the beginning of either term.

The following is the list of topics and instructors for the present year:

FALL TERM, 1880.

Personal Property. Contracts. Partnerships.	Hon. HORACE E. SMITH.

Equity Jurisprudence. Equity Practice.	Hon. WM. L. LEARNED.
Sources of Municipal Law.	H. E. SICKELS,, ESQ.
Real Property. Fixtures.	HENRY S. MCCALL, ESQ.

WINTER TERM, 1880–81.

Corporations. Contracts of Sale. Negotiable Paper. Suretyship and Guarantee.	Hon. HORACE E. SMITH.
Civil Law. Trial of Causes.	Hon. WM. L. LEARNED.
Personal Rights. Criminal Law.	Hon. MATTHEW HALE.
Domestic Relations.	IRVING BROWNE, ESQ.

SPRING TERM, 1881.

Bailments. Insurance. Agency. Insolvent and Bankrupt Laws. Torts.	Hon. HORACE E. SMITH.
Practice and Pleading under the Code and at Common Law.	CHAS. T. F. SPOOR, ESQ.
Wills. Executors and Administrators.	HENRY S. MCCALL, ESQ.
Evidence.	H. E. SICKELS, ESQ.

During the year President Potter will lecture on Feudalism and Constitutional Law, and Prof. Henry Coppée on International Law, and a course of lectures on Medical Jurisprudence will also be given.

Method and Means of Instruction.

These are mainly by lecture and examination. Two professors lecture and examine daily, except Saturday, throughout the year.

All the lectures are oral, and are expositions of legal principles with illustrations and applications including citations from and references to the latest adjudged cases. They are also accompanied by such references, hints, and suggestions as are deemed the best calculated to enable the mind the more thoroughly to the master and retain them.

The Faculty have, however, a higher aim than simply teaching young men the Law. They will also use their best endeavors to teach those who are intending to enter the profession to be lawyers. This is felt to be an arduous and difficult task. It is training the mind to a right use of its own faculties. It is giving it a power over its own resources, and enabling it fully to avail itself of its own stores of knowledge.

This is sought to be accomplished in a variety of ways — principally, however, by accustoming the young man to do that *as a student which will afterwards be required of him as a lawyer.*

The practical lawyer owes his success, in a great measure, to his quickness and accuracy in *applying legal principles to the facts of his case.* This the student is here taught to learn in the outset, by examining the reported cases referred to in the lectures to sustain the principles laid down.

The MOOT COURTS are another feature of importance to be noticed. Questions or causes, previously given out, are

here argued by four of the students. These questions and causes are either taken from, and designed to illustrate, some vexed points arising in the lectures, or they are real causes pending before the Supreme Court or Court of Appeals.

Upon the conclusion of the argument, the cause is given to the class to decide. After the decision by the class, the presiding professor gives his views on the questions involved, and on the correctness or incorrectness of the decision. Two of these courts are held each week. By judiciously pursuing this course, varied in such respects as experience may suggest, it is confidently expected that the student may be essentially aided in his efforts to become a ready, fluent and correct extemporaneous speaker, and that he may also acquire good habits of speaking — learning never to sacrifice sense to sound, or solid argument to showy declamation.

Another exercise, which is attended with very beneficial results, is the previous appointment of one of the students to prepare and read before the class his written opinion upon the points involved in each question or cause, and the grounds upon which he rests his decision. This requires the deliberate exercise of judgment, the balancing of opposing arguments, and is well adapted to fit the mind for the investigation of truth, or deciding upon controverted legal points, and for acting, if ever required, in a judicial capacity.

In addition to these class exercises, in which all the students will be required to participate, it will be optional with them to organize and conduct as many special Moot

Courts as they choose, and as many debating clubs, in which they may practice forensic eloquence, as they may think proper, and all reasonable facilities will be afforded them for these purposes.

Of these facilities the students largely avail themselves. Besides the Associated Congress for debating general questions, the students form clubs, consisting usually of from fifteen to twenty members, which are devoted exclusively to the discussion of legal questions. Every evening in the week, except Saturday and Sunday, may be occupied by the meeting of one of these clubs. Here are presented good opportunities for the discussion of legal principles, and of learning their proper application. The student will feel under no restraint, as he is arguing only in the presence of his associates whom he has himself assisted in selecting. The foundations are laid here for subsequent discussions in the class. The library, easily accessible both to the club and class, adds immensely to these facilities, since it affords the means of bringing the cases relied upon by each side under immediate critical examination and discussion.

Reading, Text Books. and Facilities for Instruction.

The reading which is more especially recommended consists in a close and critical examination of the cases referred to in the lectures, and which are cited to sustain and apply to their appropriate facts the legal principles there laid down. This species of reading, so different from that ordinarily pursued by the student in a law office, serves to fix the principles permanently in his mind, and to familiarize him with their application.

For this purpose the following facilities are afforded: 1st, The Law Library of the School which is a well chosen, good working library, containing the leading reports and text books. 2d, The Law Library of the State, the best selected, and most extensive in the Union to which students are permitted access *for reference*, subject to such rules and regulations as will ensure its proper use, and secure to the judges and members of the legal profession that full and free access to which at all times they are entitled.

In addition it is earnestly urged upon each student to procure for his own special use a few elementary books — such as Kent's Commentaries, and as many of the Text Books recommended as he is able. These he can consult at his room in connection with the Lectures, and also make use of them in his investigations of questions arising for discussion in the clubs and Moot Courts. The following are among the Text Books recommended by the Faculty, viz: Blackstone and Kent's Commentaries; Parsons, Story or Chitty on Contracts; Story, Parsons or Collyer on Partnership; Schouler's Personal Property; Angell and Ames or Potter on Corporations; Story, Benjamin or Hilliard on Sales; Edwards, Story or Daniels on Bills of Exchange and Promissory Notes; Edwards or Story on Bailments; Willard or Washburn on Real Estate; Redfield, or Wigram and O'Hara on Wills; Dunlap's Paley or Story on Agency; Reeves' Domestic Relations; Bishop's Marriage and Divoce; Bishop's Married Women; Wharton or Bishop on Criminal Law; Archbold's Criminal Practice and Pleading; Bouvier's Law Dictionary.

Under the arrangements usually made by students among

themselves, several frequently combine their resources in the shape of text books, and so enjoy the use of an increased number, at a decreased cost to each.

The opportunities for witnessing all the varieties of legal practice and styles of argument are much greater in the city of Albany than in any other place of the same size.

The following courts are held here during each year, viz :

Five terms of the County Court and Court of Sessions.

Four Circuit Courts and Courts of Oyer and Terminer.

Two sessions of the General Term of the Supreme Court, being the Appellate branch of said Court.

Twelve regular Special Terms of the Supreme Court for motions and arguments of demurrers.

Besides these Courts *all the sessions* of the Court of Appeals are held in Albany, and several sessions of the U. S. Circuit and District Courts.

There is scarcely a week in the year, with the exception of the months of July and August, that some court is not in session in this city. In these the law student will have an opportunity of listening to the highest and purest styles of judicial reasoning, and of forming his own upon the most faultless models.

The local advantages of the City of Albany, as the seat of a professional school, cannot be overrated. It is the capital of one of the leading states in the Union, whose Legislature is in session here for the third part of every year; it is easily accessible, remarkably healthful, and the

scene of great business and professional activity. It is large enough to afford its inhabitants all the means of culture and recreation naturally to be looked for in a city, while it is not so large as to make the cost of living burdensome, even to persons of extremely limited means.

In addition to these general advantages common to all the residents of the city, the Albany Law School now offers accommodations and facilities for instruction which place it on an equal footing with any Law School in the Union. It has purchased and now occupies a building in every way adapted to its needs, situated on the north side of State street between Swan and Dove streets, within a few minutes walk of the business part of the city, and from which all points of interest are readily accessible.

The building has a frontage of about fifty, and a depth of about eighty feet. On the first floor is situated a spacious library and study room well lighted and warmed, conveniently fitted with desks, book cases and tables, and open to the students at all times. On the floor above is a well lighted, and finely decorated lecture room, with all the appliances necessary for the comfort and convenience of students while in attendance upon the lectures.

Terms.

There are three terms held annually as follows :

The FIRST commencing on the FIRST TUESDAY OF SEPTEMBER, will continue for TWELVE WEEKS, closing on Friday of the twelfth week.

The SECOND will commence on the LAST TUESDAY OF NOVEMBER, and will continue FOURTEEN WEEKS, with the

exception of a vacation of two weeks, including the holidays

The THIRD will commence on the FIRST TUESDAY OF MARCH, and continue for twelve weeks, closing on Friday of the twelfth week.

The fee required in all cases where the student pays by the single term will be $50, payable in advance. But he may, when he enters, pay $130, which will be received in full for the whole course. Should the student from any necessity be prevented from attending the entire course, the money will be in part refunded according to the circumstances attending each particular case.

Attendance in the early part, even in the commencement of their legal studies, is recommended to those whose minds are sufficiently matured, as the habits they will acquire, and the hints, suggestions, and guides furnished them will essentially aid them in their subsequent course of study.

Requirements for Graduation.

On complying with the following provisions, the student may become a candidate for the degree of Bachelor of Laws.

He must be twenty-one years of age; must sustain a good moral character; and must have attended three full terms of the Law School. He must, in addition, have sustained satisfactory examinations through the different terms; must have faithfully performed all the exercises assigned to him, and have prepared and read before the class and the Faculty, six weeks before the close of the term at which he proposes to graduate, a dissertation on

some legal subject or some subject connected with the history, science or practice of the law, written by himself; the same to be written on alternate pages of ordinary sized letter paper, having a wide inner margin, and being in length from seven to ten pages, and not to occupy more than ten minutes in the reading thereof. Students must also have studied law one year, allowing a reasonable vacation, exclusive of the time devoted to our course of study. Upon complying with these provisions, and upon payment of a graduation fee of $10, and all back dues, he may, if properly qualified, receive a diploma conferring the degree of Bachelor of Laws.

The examination of candidates for graduation is partly oral and partly written, and is conducted with the same strictness as that used in the examination of candidates for admission to the bar, and upon the same subjects; conforming to the Rules of Court. It is the purpose of the faculty to make the diploma of the School, in the future as in the past, true evidence of the qualifications of its graduates.

Price of Board.

The price of board varies, according to the accommodations offered, from $4 to $7, including room, lodging, fuel and lights. Two or more clubbing together, hiring a room and boarding themselves, may bring their expenses within $3,50 or $4 a week.

For information address

HORACE E. SMITH,
Dean of ALBANY LAW SCHOOL,
ALBANY, N. Y.

UNION UNIVERSITY.

SCHOOL OF CIVIL ENGINEERING,

OF

UNION COLLEGE, SCHENECTADY, N. Y.

The object of this department, which was organized in UNION COLLEGE, in 1845, is to give its Students such instruction in the Theory and Practice of CIVIL ENGINEERING as to qualify them for immediate usefulness in the field and office in subordinate relations, and at the same time to fit them to fill satisfactorily the higher positions in the profession after a moderate amount of experience in the routine of practice.

The thoroughness and completness of the course of instruction, the unsurpassed excellence of its illustrative apparatus, the opportunities and arrangements for field practice, the moderate charges ($25 per term), and the fact that Students have access without further charge to the teachings of the other Department, commend the course to those contemplating the Engineering profession.

For circulars, or for specific information, address

PROF. CADY STALEY

Or PRESIDENT E. N. POTTER, D.D.

DUDLEY OBSERVATORY, ALBANY.

THE PRESIDENT OF THE UNION UNIVERSITY will receive and acknowledge communications.

METEROLOGICAL DEPARTMENT.

The United States Signal service has taken charge of the Physical Observatory for the establishment of a distributing Centre at Albany. The force is under the immediate command of the Chief of the Service,

GEN. A. J. MYER.

THE ASTRONOMICAL DEPARTMENT is under the direction of

PROFESSOR LEWIS BOSS.

Resident Astronomer.

UNION UNIVERSITY.

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FACULTY.

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S. O. VANDERPOEL, JR., M.D.,
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HENRY MARCH, M.D.,
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EUGENE VAN SLYKE, M.D.,
Demonstrator of Anatomy.
R. D. CLARK, M.D.,
Prosector of Anatomy.

The regular course of lectures at the college begins on the first Wednesday of October, andcontinues twenty weeks. For information inquire of Dr. JACOB S. MOSHER, Registrar, Albany, N. Y.

UNION UNIVERSITY.

UNION COLLEGE.

FACULTY.

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Acting Professor of Mental Philosophy and Hebrew.

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Lectures on Old English and on Art.

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English Essays and Oratory; and Assistant Librarian.

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Tutor in Latin and Greek.

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Professor of Military Science and Tactics.

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Adjunct Nott Professor (No. 4), Principal of Union School and Superintendent of the Schools of Schenectady.

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Christian Socialism.

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WILLIAM A. POTTER, A.M.,
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Oriental Civilization.

REV. WM. E. GRIFFES,
Oriental Art.

REV. JOHN H. ROGERS,
European Art.

JOHN R. G. HASSARD, ESQ.,
Lectures on Modern Music,

REV. EGBERT C. LAWRENCE,
Instruction in Mathematics.

J. E. VAN OLINDA,
Instruction in Music.